

RESPONSE TO LAW COMMISSION CONSULTATION “MAKING A WILL”

1. **In any new legislation on wills should the term “testator” be replaced by another term?**

If so:

- 1.1 **should the term that replaces “testator” be “will-maker”?** or
- 1.2 **should another term be used and, if so, what term?**

We believe that modernisation of legal terms is generally desirable because it aids public understanding of the law. We note for example that the switch from “plaintiff” to “claimant” in the litigation context has been successful. However, we agree that there is potential for confusion between the terms “will-maker” and “will-writer” and in this case we do not believe there is a pressing need for such a change as the term is, for the most part, only relevant when reading legislation.

We do however note that many other technical words in this field (for example ademption, chattel and probate) are all mysterious to the lay person and might benefit from modernisation.

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

- 2.1 **preparation, drafting and execution of wills; and**
- 2.2 **disputes over wills following the testator’s death**

Beyond forcing the testator to consider unpleasant concepts such as death and divorce, we believe that the impact of preparing, drafting and executing wills is very low. There is usually a cost but this tends to be low, particularly in the context of the inheritance tax savings which even a simple will can achieve.

In contrast disputes following the death of the testator often come at a disproportionate cost in terms of both money and family relationships. We have acted in a number of cases involving will disputes (both under the 1975 Act and relating to validity) where costs have run into tens of thousands of pounds. In our experience claims like these can have a devastating financial and emotional impact on families.

3. **We provisionally propose**
- 3.1 **that the test for mental capacity set out in the Mental Capacity Act 2005 should be adopted for testamentary capacity; and**
- 3.2 **that the specific elements of capacity necessary to make a will should be outlined in the MCA Code of Practice.**

Do consultees agree?

We believe that the test contained in the MCA is a flexible tool that that would help to provide clarity and consistency in regards to the application of a test for capacity. It seems telling that the current test for capacity found in *Banks v Goodfellow* was

produced in 1870 and almost 150 years on it is still undecided as to whether it is a three or a four limb test.

We also note the worrying disparity in the law whereby an individual may have capacity under the *Banks* test and yet at the same time lack capacity under the MCA when it comes to the question of statutory wills. The fact that the current state of the law may give rise to situations where statutory wills may be made for individuals who maintain the capacity to execute their own will, is strong evidence of a need for reform in this area.

The case of *Re Walker* (2015) made the point that s.3(4) of the MCA is not really dealt with under the *Banks* test. That is that the testator should not only understand the implications of making their Will, but also the consequences of not making the Will (or making an alternative Will).

There may be those who are concerned that such reform would reject in its entirety the test in *Banks* and in so doing deny the wisdom of ages that has built up through all of the case law in that area. However, we do not feel that there is a great risk that the good will be lost with the bad. The first limb of the MCA test asks whether the person is unable to make a decision “in relation to the matter”. The wording relates the test to the specific decision at hand, that of making a will, and in so doing it provides a necessary “back door” to the wealth of useful case law on the subject.

We therefore hope that such a reform would provide an opportunity for courts to discard outdated or uncertain case law while upholding the useful interpretations surrounding this subject.

We are sceptical that an entry to the Code of Practice would be the most effective of influential way to provide specific elements of testamentary capacity. Because of the size and wide scope of the Code of Practice copies of it are rarely given out and even more rarely thoroughly consulted. We propose instead that a specific code relating to testamentary capacity would be more beneficial.

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

We agree with the consultation paper that the preferred option for reform is to adopt the MCA as the test for testamentary capacity for the reasons discussed above. However, we believe that failing this many of the problems with the *Banks* test – such as the lack of clarity - could be addressed by more precise wording when incorporating the test into statute.

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

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

There is a definite need for clarity in this area and we believe that such a statutory version of the test must define it either as a three limbed or a four limbed test, but certainly not both.

We believe that a four limbed understanding of the test is preferable as it seems arbitrary to have confined this element of the test to the claims on the testator. The factors involved in decisions regarding a will are more nuanced than this.

5.2 **that a testator’s capacity may be affected by factors other than delusions or a disorder of the mind; and**

We believe that this is perhaps a question better discussed by a psychiatrist. However, although we note that capacity may well be affected by factors other than delusions or a disorder of the mind we believe that any codification should be worded conservatively so as to avoid the question of capacity being opened up to aggressive interpretations of what may have affected the testator. Ultimately the test for capacity should only consider psychiatric issues.

5.3 **clarification that the testator must have the capacity to understand, rather than actually understand, the relevant aspects of a will.**

We agree that the essential question with regards to capacity is whether the testator has the capacity to understand the will and not whether the testator actually did understand the will. There is also the need to distinguish between mental incapacity and making sure to obtain enough appropriate legal advice so that the testator appreciates the likely ramifications/consequences of their decisions.

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

We believe that one of the current problems with the *Banks* test is that the burden of proof is overly mobile. Setting out a statutory presumption of capacity will help stabilise the burden of proof. We also suggest that such a presumption may help to address the concern raised in answer to 5.2. This would also be in line with and would reflect the principle under the MCA that the “least restrictive option” be sought for the individual; operating from a starting point of capacity is empowering rather than restrictive for the individual.

7. **We provisionally propose that the rule in *Parker v Felgate* should be retained. Do consultees agree?**

[No response]

8. **We provisionally propose that:**

8.1 **a code of practice of testamentary capacity should be introduced to provide guidance on when, by whom and how a testator’s capacity should be assessed**

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

Do the consultees agree?

Such a code of practice may help to clarify the decisions in further case law surrounding the *Banks* test and would give the opportunity to further resolve any inconsistencies or outdated understandings.

We agree that such a code of practice should not be set out in statute. Apart from making the statute overly cumbersome it may also make the guidance overly rigid. The task of ascertaining an individual's capacity is a nuanced one, This is something that is recognised by the "golden rule" in *Re Simpson* which is considered to be one of best practice rather than strict law. It may be difficult to allow for this by setting out guidance in statute.

We suggest that such a code may benefit from input from the Law Society and the British Medical Association.

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

It is important to establish who the guidance will apply to. It seems reasonable to expect that such a code of practice would apply to any third party preparing a will or assessing capacity in a professional capacity. Such individuals owe a certain standard of care to their clients and a code would help prevent the matter of capacity from becoming a "tick-box" exercise.

Many wills are not prepared by a professional. And while a code of practice may not strictly apply in such a case it could still serve as a source of guidance for those who seek clarification on the matter.

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

We note that the consultation paper discusses the diverse opinions when it comes to the question of who is best placed to assess testamentary capacity. The paper suggests that the question is ultimately "a legal one".

Of course we do not wish to disregard the solicitors' expertise. And in the majority of cases hopefully a doctor and a lawyer would in fact come to similar conclusions. However, in respect of more technical cases we cautiously suggest that a doctor's assessment may be better suited. We refer again to the concern raised in our answer to 5.2. Focusing on the medical or psychiatric factors that may affect capacity helps to prevent challengers of capacity from invoking "softer" or more emotional factors that may have influenced a testator. Such an understanding of capacity naturally favours a medical assessment over a legal one in the case of a disagreement.

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

We agree. The assessment of testamentary capacity has far reaching consequences and can affect the most vulnerable of individuals. For this to be focused on primarily by professionals working in the legal and medical sectors appears rather more protective of vulnerable individuals, in particular, and avoids opening this up to additional parties where the risk of exploitation has the potential to be greater.

12. **We take the view that reform is not required:**
- 12.1 **of the best interests rationale that underpins the exercise of the court's discretion to make a statutory will;**
- 12.2 **of the way in which that discretion is exercised; or**
- 12.3 **to restrict the circumstances in which a statutory will can be made.**

Do consultees agree?

We note Harding's argument that it is difficult to apply a test of best interests to a disposition which only takes place after a testator has died. We sympathise with the difficulties with allowing for the interpretation of "the testator's best interests" to include the idea that they be remembered as having done the right thing. However in some cases this is also a very important factor to consider. In doing so it is necessary to try to maintain a clear boundary between strictly legal ideals and more personal moral principles. The current interpretation perhaps blurs this distinction to some extent and allows the court to impose the given moral values of the time onto the individual in question.

We further note Harding's more general point. In cases where the individual once had capacity to make a will and has lost it, it seems strange that the court should be able to make a statutory will rather than letting the ordinary rules of intestacy apply. It seems arbitrary to make a distinction between such cases where an individual chose not to make a will, lost capacity and then died and cases where an individual made the same choice and died immediately without ever losing capacity. However it is also the case that family and other personal circumstances can alter swiftly and it is no doubt helpful that the Court has the remit to make this particular decision if the circumstances suggest that it would be fitting and there is no restriction to putting in place what may be deemed a more appropriate arrangement if necessary. Indeed the testator may have made such changes himself or herself if they had been able to understand and appreciate a change in circumstances or fully appreciated the effect of not having made a Will in the first instance.

In regards to the making of statutory wills in cases where a person never had capacity, we do not agree with Harding's arguments. We do not believe that it is controversial for the possibility to exist.

We wonder whether it might be worth considering the old "substituted judgement" approach to statutory Wills. That is, an attempt by the court to make a Will as it would have been made by that person themselves. This was a more subjective process and considered how the individual themselves might have chosen to make their Will.

It is acknowledged that the current statutory will procedure is time consuming and costly. However, it does ensure that a vulnerable person is correctly represented and allows for careful consideration of all the relevant issues. Short of allowing for the Court to benefit from additional resources which would assist with considering an application in a timely manner, there does not seem to be any particular elements of the procedure which could be avoided. If "corners" were to be "cut" we run the risk of not undertaking work which should properly be done in circumstances where an individual lacks capacity, and this therefore poses greater risk to the individual concerned.

While a supported will making scheme sounds desirable on some level, if it could further support a vulnerable individual's ability to make decisions in this context, the MCA does provide a clear structure already to support decision-making where this is possible. We anticipate that in practical terms there would be significant difficulties in monitoring such a scheme and indeed, where would the line be drawn in specifying those who would be appropriate to undertake the role? Concerns already arise in connection with unregulated will-makers and issues which may be encountered when Wills are not carefully drawn up by experienced professionals who are members of a regulated profession. From a practical point of view we would therefore be hesitant to support such a scheme.

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

We suggest the possibility that it may not always be necessary for an Official Solicitor (OS) to be automatically appointed and that the OS only be appointed in cases where it will actually add value. However, we do not deny the significant importance of the OS' role in bringing assistance, guidance and impartiality to the proceedings. We wonder whether there might be some possibility of a fast stream procedure for non-contentious cases.

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

[No response]

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

In our experience the formalities required for a valid will have little bearing on an individual's decision to make one. In most cases our clients are not aware of the formality rules but would not risk making home made ones even if they were aware and the formality rules were simplified. They regard wills as a whole as complex documents which come packaged with important wealth and tax planning advice. The potential cost of the pitfalls justifies the cost of professionally drawn wills in most cases.

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

In our experience the main reason that people do not make their Will is because they do not want to think about their death. It requires a large amount of emotional effort to consider different eventualities and the practical needs of their loved ones. This is a cultural and a social issue that can not be changed by reform to the law.

The cost and time factors should not be discounted and this is exacerbated by the fact that a client does not see an immediate or direct *personal* benefit. The benefit of a Will is one which they, by definition, will not be alive to realise. We work hard to provide a cost-effective service for our clients nonetheless, we take the view that there will always be a cost in both money and time associated with having a will made professionally, and this may put some people off. It is impossible to avoid discussion of the difficult issues which a Will must address. A trained professional will often spot technical issues in what a lay person regards as a straightforward plan to divide their estate.

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**

See response to question 21

18. **We provisionally propose that a gift made in a will to a 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**

See response to question 21

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.**

See response to question 21

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

See response to question 21

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?**

We note that there are some concerns with regards to certain close relationships of a beneficiary. In particular, couples are increasingly choosing to forego marriage in preference of a cohabiting relationship. However, we can not see a practical way of policing this. It may become difficult for lawyers to ensure that the witness is not on what could become a long list of prohibited people. There would be no shared name with the beneficiary (as is currently the case for the majority of spouses).

What is more there is a clear legal difference between the status of a spouse and other types of familial relationship. Namely there is no direct *right* for others to benefit from the gift to the beneficiary in the same way that a spouse has. However, we believe that should cohabitants be given formalised legal rights then it may then be necessary for change.

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

We do not believe this is appropriate. It will undermine protection against fraud and undue influence. It would also be a fruitful source of litigation.

23. **We provisionally propose that the reference to attestation in section 9(d)(i) of Wills Act 1837 be removed. Do consultees agree.**

We have not encountered any problems with this section in practice. However, in general, we support anything which clarifies the law of wills. We therefore have no objection to this change.

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

Not applicable, see our response to 23.

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

We share your view that this is not appropriate, for the reasons you outline.

26. **We provisionally propose that provision for privileged wills should be retained, but should be confined in its scope to:**

26.1 **those serving in the British armed forces; and**

26.2 **civilians who are subject to service discipline within schedule 15 of the Armed Forces Act 2006.**

Do consultees agree?

We are opposed to the concept of privileged wills for the reason that they create the uncertainties highlighted by your examples. They are therefore the source of potential litigation, which can only increase the hurt caused by the loss of a loved one on active duty. As you point out, members of the armed forces are actually more likely to have made a will than civilians. The MoD clearly tries to ensure that serving personnel have the facilities to make a will easily and encouragement could be provided as a matter of routine when they are being deployed to combat zones.

You argue that the Armed Forces Covenant provides a justification for continuing to allow privileged wills. You point out that similar privileges are not available to firefighters or other state employees in roles which risk their lives. We do not see a principled distinction here: surely all such people are worthy of support. We suspect that this privilege stems from a time when service personnel were likely to be illiterate and access to legal advice was poor. These justifications are simply not present in the modern world. In fact the Armed Forces Covenant would be better served by encouraging more service personnel to make written wills, and by providing the facilities to enable them to do so.

However, if the privilege is to be retained, we agree that it is logical to extend it to all those subject to service discipline within schedule 15 of the Armed Forces Act 2006.

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**

We do see wills which do not meet the formality requirements from time to time in our contentious practice. However, because this is the very reason they have come to us, we do not consider it a reliable guide to the overall number of such wills.

In our non-contentious work we are aware of only one incident in the recent past when it was discovered after the testator's death that a will we had prepared had been incorrectly executed. We had prepared thousands of new wills in that time and therefore consider that it is extremely rare for professionally drawn wills to be invalid for non-compliance with the formality requirements. This is due in part to the fact

that a solicitor has prepared the will and either supervised or checked the execution.

28. **We provisionally propose that a power to dispense with the formalities necessary for a valid will be introduced in England and Wales.**

28.1 **We provisionally propose a power that would:**

28.1.1 be exercised by the court;

28.1.2 apply to records demonstrating testamentary intention (including electronic documents, as well as sound and video recordings);

28.1.3 operate according to the ordinary civil standard of proof;

28.1.4 apply to records pre-dating the enactment of the power; and

28.1.5 allow courts to determine conclusively the date and place at which a record was made.

Do consultees agree?

The arguments in favour of such a power are strictly practical. It would be a recognition that the necessary formalities are a means to an end and not the end itself. What is inherently important about a will is the *intention* of the testator. We note that any such power may increase uncertainty in the law and could lead to an increase in the number of disputed probates. However, we do conservatively approve of the proposed power, on the grounds that it could help to dispel injustices that arise out of the current system, but with the following important caveats:

We agree that the court is the only body that should be trusted with such a power. We can think of no other body with the necessary experience and objectivity required to legitimately exercise such a power.

We recognise that secondary records would prove essential in establishing testamentary intention. At a first reading we can see no reason why the ordinary rules of evidence should not apply to such cases.

We do not agree that such cases should operate according to the ordinary civil standard of proof. As the consultation recognises the alternative would be the criminal standard. Our first reason for this is that it would help to discourage speculative disputes arising, it is hoped that only those cases with solid grounds on which to progress would do so.

To understand the further reasoning behind this position one must compare the worst possible outcomes of the two different standards. Should the civil standard prove too lenient the court may end up giving effect to a perceived intention that was not in fact in the testator's contemplation. In comparison, should the criminal standard prove too harsh, the testator's intentions may go unaffected (as is the case under the current law). We believe that of these two possibilities the former is the more intrusive and gives rise to the greater injustice. Imposing the criminal burden of proof therefore represents a more cautious and less revolutionary reform to the law.

Our response to the question whether such a power may apply to records pre-dating the enactment of the power depends on whether it would be possible to disapply such a power in the “invalid” wills. We propose that it should be possible for a testator to disapply this power in the will, such that, even in the case of an invalidly executed will the testator’s intention to disapply such a power would still be effective. If this is the case then we do not believe that such a power should apply to records pre-dating the enactment of the power as these wills could not have been made in contemplation of the existence of such a power.

29. **We provisionally propose that reform is not required:**
- 29.1 **of current systems for the voluntary registration or depositing of wills; or**
- 29.2 **to introduce a compulsory system of registration.**

Do consultees agree?

We agree that reform is not required. It is in the interests of testators to ensure that their wills are easy to find because this will tend to ensure that their wishes are respected. Imposing further regulation on will making in order to deal with the problem of lost wills seems to us disproportionate.

Our practical experience is that, in general, our clients either keep a copy of their wills or a note of their location in an obvious place, making it easy for family members to work out where the original is stored. Where they do not, the family often know who their relatives’ preferred solicitors were and contact us anyway. We are nonetheless concerned by the problem of locating wills. We store a large number of wills as part of our service. It is complicated for us to deal with requests for them from family members due to the strict confidentiality rules which apply. We would therefore broadly welcome a move towards noting the existence of wills on a single register as a point of professional good practice. Although it is currently possible for voluntary registration with the Probate Registry, but in our experience this is an extremely underused service. It may be helpful to improve public awareness of this service.

Any move towards compulsory Will registration should of course be with a public organisation and not a private or commercial body. We are concerned however, that such a move would make it more likely that home made wills would be missed, leading to the frustration of testamentary intention in a small number of cases.

30. **We provisionally propose that:**
- 30.1 **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;**
- 30.2 **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**
- 30.3 **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 do not agree. That is not to say that we oppose electronically executed wills or fully electronic wills (we shall call both “**e-wills**”). We believe they have significant potential advantages, not least being that they may reduce the current difficulties caused by the need for physical presence at execution. However, we believe the proposal is wrong-headed for two reasons.

Firstly, in our view, the proposed power puts the cart before the horse. You are quite open about the fact that the technological infrastructure is not yet available to make e-wills a reality. Why then attempt to pre-empt their form? You rightly say that the power you propose should not anticipate the form of e-wills. You note that “sufficient” protection must be available against risks. Presumably the Lord Chancellor would be handed a very free hand in approving the form of e-wills. However, it is likely that several competing technologies will become available simultaneously. In our view, it is not sensible to hand broad powers to pick winners to the executive in the absence of an idea of the actual questions with which it will be grappling and the political issues which will be current at the time. This is particularly the case when secondary legislation is to be used. That leads to the second point.

The introduction of a special category of e-wills will mark a fundamental departure in the law of wills in this jurisdiction. It strikes us as odd to make this change without the benefit of full Parliamentary scrutiny of the new legislation. Inevitably, secondary legislation does not get the same attention as the primary sort. Is there any particular reason why a new wills act could not be introduced to deal specifically with e-wills when the time comes?

E-wills have far reaching potential to improve access to will making. However, we do not believe that rushing to provide the government with a general power to implement them is necessary, or likely to result in the best system.

31. **We provisionally propose that electronic signatures should not be capable of fulfilling the ordinary formal requirement of signing a will that applies to both testators and witnesses (currently contained in section 9 of the Wills Act 1837). Do consultees agree?**

We agree. We do not believe there is a desire for electronic signatures on wills and we are concerned that provision for such signatures is not compatible with the scheme of the Act. It is difficult to see how the requirement for the witnesses to be present would be satisfied where wills are signed and witnessed remotely by electronic means. If all the parties are to be in the same room anyway then, at the current state of technology, we do not see an advantage in using electronic signatures over traditional “wet ink” ones.

32. **We ask consultees to provide us with their comments on, or evidence about:**
- 32.1 **The extent of the demand for electronic wills: and**
- 32.2 **The security and infrastructure requirements necessary for using electronic signatures in the will-making context**

We are not aware of any demand for electronic wills.

We do not have the expertise or experience to comment on the particulars of the technology required for the use of electronic signatures. However, we do note the ability for e-apostilles in the EU and wonder whether it might be possible to follow similar principles in regards to the electronic signing of Wills.

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.**

33.1 **Do consultees think that a testator's losing the ability to revoke a will by destruction is an acceptable consequence of introducing electronic wills?**

33.2 **Are consultees aware of other serious consequences that would stem from there not being a single original copy of a will made electronically?**

We are not concerned about the loss of the ability to revoke by destruction. In our experience this is a rarely used form of revocation. We consider that it may be possible to provide for an electronic equivalent, such as a digital label which marks a will as revoked.

We are not aware of any beyond the standard concern that only one copy of a will might be updated. In the absence of detailed metadata regarding the date of the change there might be scope for argument as to which version is the most recent. This obviously creates a risk of litigation, with all the negative consequences that entails.

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.**

Please see our comments in response to question 30.

We are particularly cautious about video wills because, as you point out, there is a strong risk that imprecise language may lead to uncertainty and litigation. We consider that any professionally prepared video will would be scripted. We do not see any advantage of such a will over a traditional written will other than the potential for a video record of the "signing" and witnessing process. This would reduce the scope for argument that such wills were improperly executed and/or witnessed.

We also agree that there must be serious questions about the risk that the format and/or storage media used would become obsolete before the death of the testator, rendering an otherwise valid will inaccessible.

35. **There is currently a rule relating to knowledge and approval that mirrors the rule in *Parker v Felgate*, which relates to capacity. The rule allows, by way of exception, that the proponent of a will may demonstrate that the testator knew and approved the contents of his or her will at the time when he or she instructed a professional to write the will, rather than the time at which the will was executed.**

We provisionally propose to retain the rule.

Do consultees agree?

[No response]

36. **We provisionally propose that the general doctrine of undue influence should not be applied in the testamentary context. Do consultees agree?**

[No response]

37. **We provisionally propose the creation of a statutory doctrine of testamentary undue influence.**

Do consultees agree?

[No response]

38. **We invite consultees' views on:**

- 38.1 **whether a statutory doctrine of testamentary undue influence, if adopted, should take the form of the structured or discretionary approach.**

- 38.2 **if a statutory doctrine were adopted whether a presumption of a relationship of influence would be raised in respect of testamentary gifts made by the testator to his or her spiritual advisor.**

[No response]

39. **We ask consultees to tell us whether they believe that any reform is required to the costs rules applicable to contentious probate proceedings as a result of our proposed reform to the law of undue influence, and knowledge and approval.**

[No response]

40. **We provisionally propose that the requirement of knowledge and approval should be confined to determining that the testator:**

- 40.1 **knows that he or she is making an will;**

- 40.2 **knows the terms of the will; and**

- 40.3 **intends those terms to be incorporated and given effect in the will.**

Do consultees agree?

[No response]

41. **We provisionally propose that the age of testamentary capacity be reduced from 18 to 16 years. Do consultees agree?**

We are not convinced by the case for this change. We consider that the age limit for making wills is most appropriately aligned with the age limit for making binding contracts regarding property, because determining the inheritance of property is the primary function of a will. We do not see a principled distinction between the impact of age on the mental capacity required to make a lifetime disposal of property and the impact of age on the mental capacity required to make a disposal on death.

The argument that gifts in wills are inherently defeasible can only make sense in so far as the testator has a reasonable life expectancy. These cases, by definition, will only arise where a testator is between 16 and 18 years *and* is unlikely to live beyond 18, giving them a comparatively short time in which to reconsider. This short time frame also counters the argument that the lack of immediate reward for impulsive decisions will promote sensible decision making by minors. That argument is also countered by the practical point that we are all aware that minors (admittedly like many adults) are perfectly capable of acting impulsively out of pure spite, or for many other reasons. It is also not the case that will-making has no lifetime effect. Where parents are aware of the will the minor may well feel pressure to benefit one or both in the hope of goodwill or reward during their lifetime. They may also be influenced by the one with whom they are living.

The cases you offer in support of your proposal are moving. Nonetheless we are not convinced by them that a change is required. The example regarding dealing with a body appears to be most unusual (although we can conceive of similar situations arising where parents have different religious beliefs, for example). Even if the child had been able to appoint executors there could be no guarantee to her that they would respect her wishes. Furthermore, the problem, such as it is, already appears to have a common law solution which appropriately mirrors the role of the court in determining the welfare of minors. If a minor wishes to make a welfare related decision in life, a court determination of *Gillick* competence is required. There is an exception for *consent* where the minor is over 16 but it has been held that this does not apply to refusal and therefore there is no blanket position for under-18s.

Cases which involve the impact of the intestacy rules on minors with valuable estates and a poor relationship with one parent are presumably more common. We start from the position that Parliament has approved the intestacy rules in the full knowledge that they will not be appropriate in all cases but represent the best fit for society's expectation in most cases. It would have been fully aware of the particular potential for injustice in the case of minors.

Where, as we have argued, there is no principled reason for lowering the age of capacity for gifts in wills but not lifetime gifts, the proposed change appears to disadvantage a large class of minors by simply creating a new arbitrary bright line. Imagine, for example, a precocious 15 year old who has a large fund, a settled and reasonable desire not to benefit one parent, and less than one year to live. This reform does nothing to address her case. (This points to your question 42.)

Furthermore, you appear to ignore the impact of the *Inheritance (Provision for Family and Dependants) Act 1975*. Even where an estranged parent is unlikely to receive a large sum, the breadth of the jurisdiction creates a litigation risk which may encourage estates to settle, if only to avoid the costs of a claim.

Finally, where the case involves a personal injury fund, or some other form of compensation, we believe that the problem of intestacy could be addressed through the terms of a lifetime trust of the fund. In our experience practitioners do address this point in cases of current and likely family breakdown.

42. **Should the courts in England and Wales have the power to authorise underage testators to make wills?**

If so, who should be allowed to determine and underage testator's capacity at the time the will is executed?

We support this change. In our view, this approach would be a far more effective solution to the issues you highlight.

We believe that the court is best placed to assess capacity at the time of execution. We envisage a jurisdiction similar to that for statutory wills in which the court would assess the circumstances, make a capacity assessment and approve the will. Not only would this approach avoid a bright line cut-off but it has the potential to deal with many of the other problems raised. A court could, for example, hear evidence about potential improper influence by one parent or another. It might even make an assessment of need which might head off the possibility of a claim under the *Inheritance (Provision for Family and Dependants) Act 1975*. A court ruling would also deal with any suggestion of impulsiveness on the part of the minor. We also feel that this is an appropriate extension of the court's role supervising the welfare of minors.

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?

[No response]

44. **Do consultees know of any cases in which the order of interpretation and rectification has caused problems in practice? If so, please explain the facts of the case and the nature of the problem.**

[No response]

45. **We provisionally propose to replace sections 23 to 29 of the Wills Act 1837, modernising and clarifying the language of those sections while retaining their substantive effect.**

Do consultees agree?

We agree. As we have said, we support the modernisation of legal terminology. We believe that the rules contained within the sections identified are well understood and practical. Their retention, in modern form, is therefore desirable.

46. **As regards sections 23 to 29 of the Wills Act 1837, we ask consultees whether in their view:**

46.1 **any of those provisions are obsolete;**

46.2 **any of those provisions require substantive alteration; and**

46.3 **if any provisions are obsolete or require substantive alteration, what changes are needed and why.**

Please see our response to question 45.

47. **We provisionally propose that section 30 of the Wills Act 1837 be repealed**

Do consultees agree? If not, please provide evidence of the practical use of section 30 of the Wills Act 1837

We agree. We have not come across any use of this section in practice.

48. **We provisionally propose that section 31 of the Wills Act 1837 be repealed**
Do consultees agree? If not, please provide evidence of the practical use of section 31 of the Wills Act 1837

We agree. We have not come across any use of this section in practice.

49. **Do consultees think that there is any need for any new interpretative provisions in the law of wills?**

If so, please state:

- 49.1 **What problem the new provisions would address; and**

- 49.2 **Why that problem is inadequately addressed under current law.**

Please also give an example of a case in which the problem has arisen where possible.

We are not aware of any need.

50. **Do consultees think that the scope of rectification in the law of wills should be expanded?**

[No response]

51. **We provisionally propose that the Mental Capacity Act should be amended to provide that disposal of property by an attorney, where the donor lacks testamentary capacity, does not adeem a gift.**

Do consultees agree?

We agree that it is desirable to resolve the anomaly that gifts by attorneys and deputies have different effects under the law of ademption. However we believe that a preferable way to do this might be to abolish sch.2 para. 8 of the MCA. Therefore whenever property is sold, whether by a deputy or an attorney, the gift will adeem.

52. **We provisionally propose that a specific gift should not adeem where, at the time of the testator's death, the subject matter of that gift:**

- 52.1 **has been sold but the transaction has not been completed; or**

- 52.2 **is the subject of an option to purchase.**

In those circumstances, the beneficiary of the specific gift that would otherwise have adeemed will inherit the proceeds of the sale.

Do consultees agree?

We do not agree with this proposal. You suggest that the rationale for the law of ademption is the presumed intent of the testator. We are surprised by the suggestion that entry into a binding contract for sale is not evidence of a testator's intention to rid his estate of the property in question. We suspect that most lay people would be surprised also. You quote one commentator who suggests that an

option is easier to overlook than a contract [for sale]. Our experience of clients who enter into these documents is that they rarely overlook either.

Your approach actually favours the beneficiary's pecuniary interest in the gift, rather than the testator's intention that the specific gift should pass to that beneficiary. In our experience, well advised testators generally avoid leaving specific gifts deliberately to avoid the risk of ademption, unless there is some particular sentimental or family reason for the gift. Such a reason would be defeated if the property were sold, lost or destroyed and therefore ademption makes sense in most cases.

There will be situations in which these sale and option arrangements persist for years, during which time the gift beneficiary will enjoy an interest in the property. There may even be cases in which poorly advised beneficiaries mistakenly accept the proceeds of sale, only to find themselves sued by the residuary beneficiaries. We therefore accept that there is some practical value in abandoning ademption in such cases. However, in our view, this would undermine the concept.

53. **We provisionally propose that, except where a contrary intention appears from the will, a gift of shares will not be subject to ademption where the subject matter of the gift has changed form due to dealings of the company which the testator has brought about**

While we agree that such a rule would better reflect the intentions of testators, we do not believe that there is a serious problem to be addressed here. It is notable that no recent cases are cited in support of your argument. We believe that professional will drafters are aware of this trap and enable testators to avoid it. Furthermore, it is difficult to frame a principled definition of a change to a company's shares which a shareholder has not brought about. Changes imposed by Parliament are an easy example. In other cases, for example where the testator is a non-director minority shareholder, would it be necessary to check whether the testator had voted against the change (or abstained)? Overall, we are concerned that this rule has the potential to cause more problems than it will solve.

54. **We provisionally propose that a beneficiary be entitled to the value of a specific gift that has been destroyed where the destruction of the property concerned and the testator's death occur simultaneously.**

Do consultees agree?

This argument is more powerful than that advanced in support of your proposal at 52. Where a testator has died at the same time as the destruction of a possession he clearly has no chance to amend his will to take account of it. However, we take the view that your argument is still flawed.

The argument you advance can also be applied to items which are destroyed, etc. shortly before the death of the testator in circumstances in which he cannot reasonably be expected to amend his will. Imagine, for example, that a testator carrying a vase specifically gifted under his will falls out of a window. Say there was clear evidence (such as CCTV) that the vase hit the ground first, and smashed, followed by the testator, who died. In this example the testator would not have an opportunity to amend his will on seeing the destruction of the vase. The current legal presumption would not apply (it would not be needed) but neither would your proposed simultaneous destruction rule. Your argument therefore suggests that ademption should not apply where death occurs *within a reasonable period after*

the destruction, etc. of a specifically gifted item. If you create a bright line cut-off (simultaneous destruction only) you disadvantage many of the people you are trying to assist and risk inconsistency for the benefit of increased certainty in the administration of estates.

By contrast, if you take our position that ademption actually exists in order to reflect the well advised testator's intention to give an item for sentimental rather than pecuniary reasons (as set out in our response to 52), then the current position makes sense. We believe it should be retained.

55. **We invite consultees' views about whether there are further specific instances in which the effects of the doctrine of ademption should be mitigated.**

We are not aware of any.

56. **We ask consultees for their views on reform to create a general exception to ademption where the property that is the subject matter of a specific gift and would otherwise adeem is no longer in the testator's estate due to an event beyond the control of the testator.**

We do not support this reform for the reasons set out in our responses to 52-54. Well advised testators already usually avoid the problem of ademption. Aside from the problems created by the notion of events being "beyond the control" of the testator, we believe that such a reform would defeat that actual purpose of the doctrine of ademption: to reflect the well advised testator's intention to give an item for sentimental rather than pecuniary reasons.

57. **We ask consultees for their views on reform to create a general exception to ademption, so that the beneficiary of the gift receives any interest that the testator holds in the property that was the subject of the gift at the time of his death.**

Please see our response to 56.

58. **We provisionally propose that no reform is required to the law governing the revocation of wills by will or codicil, writing or destruction**

We agree.

59. **We ask consultees to provide us with any evidence they have on the level of public awareness of the general rule that marriage revokes a will.**

Do consultees think that the rule that marriage automatically revokes a previous will should be abolished or retained?

Our experience is that, while there is a general understanding that a new will should be made following a marriage, few people appreciate that marriage actually revokes most previous wills. This is a point on which we are always careful to advise where the testator is unmarried.

On balance, we are in favour of retaining this rule as the default. We believe that it, combined with the intestacy rules, reflects our clients' general expectation that a spouse should receive the bulk of the deceased's estate in most cases. However,

we believe it would be useful for non standard cases and more sophisticated testators to have the option you suggest at 60.

60. **Should testators be empowered to prescribe whether a will or particular dispositions in it should be revoked by a future (uncontemplated) marriage?**

As noted in our response to 59, we believe this option would be a useful tool for sophisticated testators and non-standard cases (you raise the examples of second families and long term co-habitants). Such people would need careful advice but are likely to be acutely aware of their testamentary position anyway.

As you note, this change would arguably be a good thing in any event as it would tend to support the principle of testamentary freedom.

61. **We provisionally propose that marriage entered into where the testator lacks testamentary capacity, and is unlikely to recover that capacity, will not revoke a will.**

Do consultees agree?

We agree. If the testator lacks the capacity to make a Will we do not believe that it should be possible for a decision they have made in this state, such as marriage, should be possible to revoke or in any way affect the Will.

What is more if the marriage is invalid on account that the testator lacked capacity only the parties themselves would be able to challenge it. In the majority of cases the revocation of the Will will only be called into question after the testator has died and at this point it is difficult to see how the marriage itself could be challenged.

62. **We propose that section 8 of the Inheritance (Provision for Family and Dependants) Act 1975 be amended to provide that property that is subject to a mutual wills arrangement be treated as part of the net estate.**

Do consultees agree?

We do not see many mutual wills cases in our practice. We suspect that they are now extremely rare as testators have other options for controlling their estates after death. Therefore we are concerned that there is no real problem to be addressed here and believe the simplest approach to dealing with the well known flaws in the doctrine of mutual wills would be to abolish it entirely. However, we do support this reform. It is a simple tweak which, by introducing some flexibility into the mutual wills doctrine, will help to alleviate the problems it generates in practice. We believe that the change would be consistent with the general scheme of the Act, with its broad jurisdiction to do justice, that property subject to a mutual wills trust be included within its scope.

63. **Do consultees believe that the DMC doctrine should be abolished or retained?**

We suspect that cases in which donationes mortis causa are challenge are extremely rare in practice (although we understand that the issue came up in the recent unreported case *Re Exler* [2017] EWHC 1189 (Ch)). We do not see why someone who is on their deathbed should also lose the ability to control their property as well. For this reason we believe that the doctrine should be retained.

64. **Are consultees aware of particular issues concerning the transfer of digital assets (be it on death or otherwise)?**

If so, please provide details of:

64.1 **the effect that the issue had upon the people concerned;**

64.2 **the scope of the problem; and**

64.3 **why the problem is inadequately addressed under the current law.**

We have not encountered any real problems in practice. However, we consider that it is only a matter of time before we see a probate matter in which vital information is only stored digitally in a format which it is impossible, or very difficult, for the executors to access. Very few testators appear to have considered this issue. We believe that a right to access email, social media and other online accounts will be needed to address the problems likely to arise.

We suggest that Internet Service Providers be asked to sign up to a code of practice. We also wonder whether users of these services should be asked, at the point of engagement, whether they want any assets to pass on death.

65. **Are consultees aware of any instances in which the requirement to date an appointment of guardianship but not to date a will has caused difficulty in practice?**

If so, please provide details of the case.

We are not aware of any such cases. In our experience the vast majority of professionally drawn wills are dated.

Thomson Snell & Passmore LLP

10 November 2017