Modernising Succession: Law Commission Consultation

Last month (13th July 2017) the Law Commission launched a consultation paper to tackle issues surrounding the law of Wills, chiefly aiming to bring Wills into the modern age. The Law Commission has highlighted the age of the current legislation as a root of the problem and suggested that the law needs to be modernised to reflect changes in society, technology and medical understanding – we’ve come a long way since the Wills Act was first introduced in 1837.

This month’s paper will examine some of the main proposals put forward by the Law Commission, focusing mainly on matters related to capacity.

**WHY THE NEED FOR MODERNISATION?**

The underpinning statute for succession law is the Wills Act 1837 (WA 1837). This has been updated over the years as changes in societal norms have called for it, for example the latest significant amendment was the addition of section 18(5) and section 18D to take account of the provisions of The Marriage (Same Sex Couples) Act 2013. Before that the WA 1837 saw the addition of sections 18B-C to reflect the introduction of Civil Partnerships via the Civil Partnership Act 2004. So while the WA 1837 has been updated over the years, perhaps after nearly 200 years it’s time for a review.

Our understanding of mental health and capacity has also moved forward since the main case setting out the legal test for capacity was decided in 1870 (*Banks v Goodfellow* [1870] LR 5 QB 549).

Modern families need a more modern approach to succession. More people are cohabiting without marrying or forming a civil partnership, and more people are remarrying and merging families.

More needs to be done to address digital legacies and the increased reliance on technology, possibly by introducing electronic Wills in future.

**THE MAIN PROPOSALS:**

For ease of reference to the summary of the consultation paper this paper uses the same headings.

Electronic Wills

To meet the formality requirements of s9 WA 1837 a Will must be in writing. Currently a Will may be prepared electronically using a word processor or Will writing software, but at some point it must be printed and sent to the client to be executed. A wet ink signature by the testator and witnesses is required.

People are become increasingly reliant on technology and expect to be able to manage many of their affairs online; from mobile banking to managing billing accounts online, so why not their Will? The Law Commission proposes developing this area of law so that Wills could be validly executed electronically, making the whole process digital and introducing ‘electronic Wills’. This could make the whole process of Will drafting cheaper and more convenient for the Will Writer and testators.
Electronic Wills could make making a Will more convenient, thereby increasing the amount of the population who make a Will. They could be especially convenient for testator’s with physical disabilities who would be more likely to engage with a fully online service. They could also be stored more securely, with much less chance of being lost than a physical copy tucked away in a drawer in the testator’s home. There is also potential for an electronic Will system to be linked to an electronic probate system that would streamline the whole process of admitting a Will to probate.

No other jurisdiction has successfully introduced electronic Wills. To do this new legislation would need to be introduced to recognise electronic signatures in the context of executing Wills. The Law Commission has identified two main challenges to introducing electronic signatures to Wills. These are security and infrastructure.

In terms of security the electronic signature must be more than the testator’s named simply typed. This is too susceptible to fraud as any electronically typed name looks the same no matter who types it. Similar problems apply to digital images of written signatures. More complex methods would be required such as biometrics or encryption based signatures that could be linked to the testator more reliably. The Law Commission concludes that electronic signatures must obviously be at least as secure as handwritten signatures, and as there are various means of making an electronic signature special legislation will be required to address how to assess what is a secure enough electronic signature for a valid Will.

Regarding infrastructure, the systems used to enable making and executing a Will electronically must be accessible. Adopting too rigid requirements could have the opposite effect and discourage people from adopting electronic Wills. There would be similar barriers to overcome with cost; if the price of developing a secure electronic Will system is too high people will not take it on.

**Supported Wills**

A formal support scheme has been proposed for assisting those with diminished capacity to write a Will. Many people with capacity issues are supported by their friends, family, and carers who help them make decisions. Currently the system allows for supporting testators in their decision making to an extent, for example by providing extra assistance to help a testator with communication issues, or by using various methods to help a testator understand the extent of their estate. However, the current legal test for capacity does not actively promote supported decision making so new legislation may be required moving forward.

It is suggested that a system of supported Wills would assist these people and fill the gap between those who have the capacity to make their Will and those who lack capacity and who must apply for a Statutory Will.

This may give more people the ability to write a Will, giving people with diminished capacity greater testamentary freedom. Of course this will still need to be balanced with providing protection for testator’s and preventing people being unduly influenced.

This would ensure that fewer people with diminished capacity would need to apply to the Court of Protection in order for a Statutory Will to be prepared; keeping costs down for them as any formal support
scheme would be cheaper than the process of applying for a Statutory Will, although it would likely be publicly funded.

**Capacity**

Since the introduction of the Mental Capacity Act 2005 (MCA 2005) there has been debate over whether the statutory test should be applied when assessing testamentary capacity or whether the common law test should continue to be applied. It is proposed that testamentary capacity should be governed by the capacity test in the MCA 2005 rather than the current common law test in *Banks v Goodfellow*, effectively putting an end to that uncertainty.

The language of the common law test could be described as archaic, so bringing the language up to date would be beneficial for testator’s and practitioners seeking to apply the test.

This leading case on the legal test for capacity was decided in 1870, and since then our understanding of mental health and disorders that can effect capacity has greatly improved. In the case of *Key v Key* [2010] EWHC 408 the effect on a testator of bereavement was considered when applying the common law test, which was not made with this in mind. To address the needs of an aging population and reflect our greater understanding of disorders than can affect a person’s capacity it is suggested that a new test of capacity is needed.

The two-part capacity test offered by section 2 of the MCA 2005 applies in multiple contexts and should be familiar to Will Writers, legal professionals, medical practitioners and others whose opinion will be sought when assessing capacity. Applying the statutory test would also unify the laws approach to capacity, as currently there are circumstances where the statutory test is applied, for example in relation to Lasting Powers of Attorney and when determining capacity for Statutory Wills, and other circumstances where the common law test applies.

The presumption of capacity, unless otherwise proven, is particularly important in the Law Commission’s view, as it draws attention to the English legal system’s ‘functional approach’ to capacity and the fact that capacity must be assessed on a case by case basis. The starting point must always be to presume that a testator has capacity, a drafter cannot assume that a testator lacks capacity on the basis of advanced age or medical condition as this alone is not enough to prove a testator lacks capacity.

The consultation recommends providing statutory guidance for doctors and others carrying out capacity assessments. The MCA 2005 is already supported by a code of practice, and the Law Commission proposes including guidance on applying the statutory test specifically to those writing Wills to this code of practice.

As an alternative to the above, the consultation paper also discusses the merits of bringing the common law test up to date by statute. This would mean that the common law test could be redrafted and made more accessible by using modern language. It would also bring it up to date with current medical understanding of capacity, defeating the criticism that the current test is outdated and was decided at a time when mental health and the range of factors that can effect capacity were not properly understood. Furthermore, it would also be an opportunity to clarify key aspects of the test.
**Knowledge and approval**

A testator must know and approve of the contents of their Will at the time of its execution. This is clearly closely linked to capacity. A testator may have the required testamentary capacity but fail to understand the content of their Will. A testator may still have sufficient knowledge and approval even if they do not understand the language used by the drafter exactly, for example technical legal terms, as long as they know the effect of their Will.

Where a testator lacks knowledge and approval their Will is invalid. It is for the person propounding the Will to establish that the testator had knowledge of and approved the contents of their Will (*In the Estate of Sherrington, Sherrington v Sherrington* [2005] EWCA Civ 326, [2005] 3 FCR 538).

Where a testator has read their Will or had it read over to them before execution, or where the contents have been brought to their intention in any other way such as through sign language, and the Will has been executed, a rebuttable presumption that the testator knows and approves of the contents of their Will arises.

Currently there is overlap between knowledge and approval and undue influence. There are many cases where a Will has been challenged on the grounds of lack of knowledge and approval when it would be more appropriate to challenge it on the grounds of undue influence. The full consultation paper identifies 3 main reasons for this, but combined they all highlight a failing in the application of undue influence. These reasons summarized are as follows:

- Where lack of knowledge and approval is alleged the burden of proving the testator had knowledge and approval lies on the person propounding the Will, whereas the onus lies on the person challenging the Will when undue influence is alleged. Worse, the person who challenges the Will on the grounds of undue influence and loses their case will find themselves paying the court costs.
- People are generally reluctant to accuse a family member of fraud or undue influence, so a claim of lack of knowledge and approval is preferred
- Claims of lack of knowledge and approval can be used to ‘cloak’ what is really a claim of fraud or undue influence, as was the case in *Wintle v Nye* [1959] 1 All ER 552

The Law Commission’s proposal is to narrow the scope of knowledge and approval to make it clear that the test of whether a testator knew and approved of the contents of their Will is entirely separate from the question of whether they freely executed the Will and were not coerced.

**Signing on a testator’s behalf**

A Will must meet the formalities of s9 in order to be valid. A key requirement is that a Will must be signed by the testator, but may be signed by some other person in the testator’s presence and at their direction (s9 (a) WA 1837). This is all the legislation has to say on the matter. Under the current law no restriction is imposed on who may sign the Will on the testator’s behalf; this could be a witness, the drafter, or even a beneficiary of the Will.
It is suggested that the law should place restrictions on who can sign on the testator’s behalf as the current position is too wide and could leave a testator open to fraud. It seems reasonable to place restrictions on who may sign a Will on behalf of the testator, as there are already restrictions on who may witness a Will so logically it makes sense for similar restrictions to be imposed on who may sign it.

**Undue influence**

If a Will is made as a result of the testator being subjected to fraud, fear, or undue influence it is invalid; however the onus is on the person claiming the undue influence, there are no presumptions to assist the person challenging. There is also a high burden of proof on the person claiming undue influence. Testamentary undue influence appears to be limited to cases where the testator was coerced, or enough pressure was applied to overpower the testator’s freedom of action. The courts are more inclined to find undue influence where the testator is physically or mentally weak, as where a testator is mentally weak less pressure may be required to overbear their Will.

This is in contrast to undue influence where lifetime gifts and contracts are concerned, as here there are a number of presumptions. The main presumption is the existence of a ‘relationship of influence’ between certain parties, which may give cause for the gift to be explained. Where there is a presumption of a relationship of influence, there may not necessarily have been any *undue* influence. There is a presumption of a relationship of influence where a gift is made by:

- a child to a parent or guardian
- a beneficiary to a trustee
- a client to a solicitor
- a patient to a doctor or other medical practitioner
- a follower to a spiritual leader

If there is a relationship of influence, the person alleging undue influence must also show that the gift calls for explanation.

The Law Commission believe that the current system of setting a gift aside due to undue influence is too narrow in comparison to proving undue influence with a lifetime gift. Two approaches are proposed for a doctrine of testamentary undue influence; a structured approach or a discretionary approach.

The structured approach would be based on the lifetime gifts rules and would be a two-limb test. Under this, a presumption of undue influence would be raised if:

- there exists a relationship of influence; and
- the gift calls for explanation

Relationship of influence would be presumed in respect of gifts to:

- a trustee
- a medical adviser
- a person who prepared the will for remuneration
- a professional carer
For all other types of relationship there is no presumption and the fact a relationship of influence exists would need to be proven.

When considering if the gift calls for explanation, the court would consider two factors:

- the conduct of the beneficiary in relation to the making of the will; and
- the circumstances in which the will was made

There is also a suggestion that where a beneficiary was instrumental in the preparation of the Will there should be a presumption of undue influence.

Under the alternative discretionary approach, the court could instead presume undue influence if it were satisfied that it is just to do so in all the circumstances of the case. This approach would still consider relationships of influence and calls for explanation, but they would only need to consider them alongside the general facts of the case instead of having to be individually satisfied of the two criteria as under the structural approach.

Under either approach, if the presumption is raised it would be up to the person defending the gift to rebut the presumption.

**CONCLUSION**

This paper has been by no means a full summary of the Law Commissions proposed reforms to the law surrounding Will Writing, only an examination of some of the key proposals. We would urge Members to read the full report or the official summary by following the links provided below.

The full Law Commission Consultation Paper No 231 and summary can be read by following this link: [http://www.lawcom.gov.uk/project/wills/](http://www.lawcom.gov.uk/project/wills/)

The consultation is open to responses until 10 November 2017.