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# LAW COMMISSION CONSULTATION MAKING A WILL

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Law  
Commission  
Reforming the law

## Making a will

Consultation Paper 231



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# An extensive consultation...

- 270-page consultation document (with a separate 16-page summary)
- Asks 65 consultation questions
- Covers most aspects of wills – see **Table 1: Overview**
- Provides a useful summary of current principles
- For documentation: [www.lawcom.gov.uk/projects/wills](http://www.lawcom.gov.uk/projects/wills)



# Timetable



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- Public consultation launched 13<sup>th</sup> July 2017
- Consultation period closed 10<sup>th</sup> November 2017
- Law Commission currently analysing responses
- No firm date for report/recommendations to Government (mid 2019?)





# Notes cover



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- Capacity
- Formalities
- Protecting vulnerable testators: Knowledge and approval and undue influence
- Interpretation and rectification
- Mutual wills
- Electronic wills
- Other things a will could do



# Capacity

## The test for capacity

- Codifying the common law test in *Banks v Goodfellow* or adopting the statutory test in the MCA 2005
- The Commission proposes to adopt the MCA test, with the specific elements about will-making to be covered in a Code of Practice
- The rule in *Parker v Felgate* to be retained

## The assessment of capacity

- The *Golden Rule* to be replaced by guidance in a Code of Practice



# Formalities

Two main themes:

- The archaic nature of the Wills Act 1837 and the scope for repeal/replacement with more modern, functional legislation (particularly in view of the other issues under consultation)
- The introduction of a dispensing power
- Query a system of registration of wills





# Protecting vulnerable testators: Knowledge and approval and undue influence

- The consultation contains a helpful review of the two requirements
- The Commission clearly favours a more user-friendly, statutory doctrine of undue influence (in which the role of knowledge and approval could be clarified)
- It could adopt a structured approach (similar to the common law) or a discretionary approach
- The Commission considered that if a statutory doctrine was introduced, there would be more scope for costs to be paid from the estate



# Interpretation and rectification

- Again, the consultation contains a useful review of the principles
- The Commission have proposed no real change – partly because they anticipate the reform of the Wills Act or at least the introduction of new interpretative provisions
- The Commission also recognise the likely overlap with the introduction of a dispensing power



# Mutual wills



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- There is an important distinction between *mutual wills* and *mirror wills*
- The Commission recognised some of the problems in dealing with mutual wills but have not proposed any major reforms
- However, they have proposed that assets held on trust pursuant to a mutual wills arrangement should form part of a deceased's net estate for the purposes of the Inheritance (Provision for Family and Dependants) Act 1975



# Electronic wills



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- This is one of the 'headline' topics for review
- The Commission carried out an extensive review of all forms of electronic will making, focusing on issues about (1) electronic signatures (2) standardised infrastructure and (3) consistency across platforms
- There were particular concerns about electronic signatures (and issues of proof), storage, and video wills
- The Commission proposed the introduction of an enabling power by statutory instrument to recognise electronically wills as valid
- The introduction of electronic wills also has to be considered alongside dispensing powers



# Other things a will could do

- Cater for digital assets – the Commission considered that the law governing succession to digital assets fell outside the scope of their review
- Burial and cremation – the Commission did not consider the need for reform
- Guardianship – the Commission noted a minor conflict between wills and appointments in writing pursuant to s 5 Children Act 1989



# What to expect?

## The headline proposals:

- Repeal and replacement of Wills Act 1837
- Introduction of a 'dispensing power'
- Introduction of an enabling power to recognise electronically executed wills as valid
- Amendments to MCA 2005 to take in a statutory test of testamentary capacity and an amended MCA Code of Practice to cover the assessment of capacity
- A statutory doctrine of undue influence, taking in knowledge and approval





# What could it mean for non-contentious work?

- New ways of making a will (with less dependence on professional will-writers!)
- Fresh terminology in wills
- Clarity in the arrangements for dealing with capacity issues
- Clarity in heading off undue influence



# What could it mean for contentious work?

A range of new litigation topics

- Validity
  - Electronic wills
  - The dispensing power
- Capacity
  - A new statutory test
  - Applying the Code of Practice
- Interpretation
  - A new Wills Act or new interpretative provisions
- Enforceability
  - Statutory doctrine of undue influence/knowledge and approval



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