LAW COMMISSION
CONSULTATION
MAKING A WILL

By Nigel Clayton TEP
Making a will

Consultation Paper 231
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
Timetable

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

• 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
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

• 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

- 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
Nigel Clayton TEP
nclayton@kingschambers.com