



MAKING A WILL

This optional response form is provided for consultees' convenience in responding to our consultation on making a will.

The response form includes the text of the questions in the consultation, with boxes for yes/no answers (please delete as appropriate) and space for comments. You do not have to respond to every question. Comments are not limited in length (the box will expand, if necessary, as you type). There is an opportunity to give more general comments at the end of this form.

Each question gives a reference in brackets to the paragraph of the consultation at which the question is asked. Please consider the surrounding discussion before responding.

We invite responses by **Friday 10 November 2017**.

Please return this form by email to propertyandtrust@lawcommission.gsi.gov.uk.

If you would prefer to respond by post, the relevant address is:

Damien Bruneau,
Law Commission,
1st Floor Tower, Post Point 1.53,
52 Queen Anne's Gate,
London SW1H 9AG

We are happy to accept responses in any form. However, we would prefer, if possible, to receive emails attaching this pre-prepared response form.

Freedom of information statement

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If you wish your response to be confidential, please tell us why you regard the information as confidential. On a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded as binding on the Law Commission.

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CONFIDENTIALITY

Do you wish to keep this response confidential?

If yes, please give reasons: We do not seek confidentiality for any part of the Response other than the case example given in respect of Rectification in Answer to Question 50, which is an ongoing case.	

QUESTION 1

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

If so:

- (1) should the term that replaces “testator” be “will-maker”? or
- (2) should another term be used and, if so, what term? (paragraph 1.9)

Yes:	No:	Other:
<p>Our tentative response is no, though we acknowledge that lawyers are not the people to ask about the use of jargon.</p> <p>We recognise that testator is a word outside the usual person’s vocabulary, but it has the advantage of being an accurate label.</p> <p>We also are concerned that will-maker sounds confusingly like will-writer, which is the adopted name of non-solicitors who are in the business of “making” wills.</p>		

QUESTION 2

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

- (1) preparation, drafting and execution of wills; and
- (2) disputes over wills following the testator’s death. (paragraph 1.36)

<ol style="list-style-type: none">(1) The financial cost of making a will is normally very little in either cash terms or proportionate to the advantage to be gained. The market is very competitive, and prices are low, partly because the solicitor may hope to obtain the probate on death. Oddly enough, some unregulated will-writers can be scandalously expensive, making bold promises for the value of their wills.(2) Disputes over wills post-death can be ruinously expensive and wretchedly ruinous to peace of mind too. We have experience of post-death disputes contributing to the death of one of the

disputants.

We suspect, however, that disputes over inheritances are things which are ingrained in society from early history. They will continue as long as society continues in its current form. They arise usually not through legal mistakes or complexities, but through broken promises, failed expectations, impaired relationships in later life, or deep-seated hatred/envy going back decades. The complexity of the law often reflects the importance of succession in society, but the difficulty of applying blanket rules to families which have very different issues.

QUESTION 3

We provisionally propose

- (1) that the test for mental capacity set out in the Mental Capacity Act 2005 should be adopted for testamentary capacity; and
- (2) that the specific elements of capacity necessary to make a will should be outlined in the MCA Code of Practice.

Do consultees agree? (paragraph 2.73)

	No:	Other:
We see no need for this, and regard it as misconceived:		
<ol style="list-style-type: none">1. There is no room for doubt (so no clarity needed) – the MCA does <u>not</u> apply to Wills made by individuals. It only applies for the purposes of the MCA – e.g. to the exercise of the Court of Protection’s (COP) function – see: s. 1(1) MCA. That is also well settled at first instance, and we cannot envisage that it will be overturned by the CA.2. There is no room for conflict. If the COP decides that an individual has no capacity to make the will, and the COP then makes a statutory will, it cannot be challenged post-death for lack of capacity. If the COP decides the individual has capacity, the individual will, no doubt, make the will. Whether it is valid or not will be capable of challenge post-death, but in practice the challenge will not succeed unless new evidence emerges.3. The MCA focuses on facilitating individuals to act where they have the capacity to do so. It is a Mental Capacity Act, not a Mental Incapacity Act. Its tests therefore need to be more focused on encouraging and empowering, rather than preventing. But after the event, the decision is much more binary – did X have capacity to make that will at that time?		

Yes or No. The remarkable case of *Sharpe v Adam* illustrates this vividly. A severely disabled person is facilitated, with great care and support from a multi-professional team, to make a Will. The COP is not involved, no doubt absolutely correctly at that time. But post-death, a rigorous forensic investigation concludes that the testator did not have capacity.

4. Because of the MCA's focus, there is a real difficulty in applying s. 1(3) post-death: "a person is not to be taken to be unable to make a decision unless all practicable steps to help him do so have been taken without success". That would appear to mean that a will would have to be held valid, if insufficient steps had been taken to assist him. That must be the opposite of what ought to apply.
5. We regard it as a serious mistake to apply the MCA test to wills, which have already been made.
6. Nor do we see how embodying the *Banks v Goodfellow* test into the Code of Practice helps. If it is the wrong test, which is what the supremacy of the MCA would imply, how could it be used within the code of practice to prevent a testator from making his own will? But if it is the right test, why is it not retained?

QUESTION 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. (paragraph 2.85)

Most of the justifications suggested in the Report do not, with respect, appear convincing to us:

1. We accept that the wording might be simpler (though are not wholly confident). The wording of the test is actually admirably simple and relatively straightforward, at least until the insane delusions question. It is also essentially a legal and not a psychiatric test, and current psychiatric thinking may change in the medium term.
2. The test does not indicate that only disorders/delusions deprive a person of capacity.

3. The test is a 4-limbed test. No further clarity is needed, and it is not worth moving to a statutory definition simply for this.
4. The question about understanding vs capacity to understand is settled at Court of Appeal level (*Hoff v Atherton*), and no one would expect the Supreme Court ever to overturn it. It is settled. If a testator does not actually understand the will and its effects, then want of knowledge and approval applies.
5. It would not make the law more accessible, as suggested in 2.82, which is in the context of many people writing their own wills without legal assistance. We take the view that no such person has ever stopped to consider whether he or she has legal capacity to make his or her will, before doing so, let alone been confused by the finer wording of *Banks v Goodfellow*.

QUESTION 5

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

- (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;
- (2) that a testator's capacity may be affected by factors other than delusions or a disorder of the mind; and
- (3) clarification that the testator must have the capacity to understand, rather than actually understand, the relevant aspects of a will. (paragraph 2.85)

Yes. If (contrary to our view) the test is to be recast, then these 3 factors should all be included.

QUESTION 6

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

Do consultees agree? (paragraph 2.88)

	No:	Other:
<p>The current system works very sensibly and very well in practice. If there is no clear evidence of incapacity around the time of the Will, then the burden of proving incapacity is on the person challenging the Will. If there is such evidence, then the burden is on the person trying to uphold the Will. But these are only evidential burdens of proof. A statutory presumption post-death may be a mockery. It is a perfectly sensible starting point pre-death, since it respects an individual's rights. It is aimed at ensuring that his right to act, his independence and recognition as a person, are not trodden underfoot by the state in a discriminatory way. But once he is dead, and a will is under challenge, then the testator will, of course, have made his will and exercised fully his right to do so. A presumption post-death does not serve the purpose that the MCA's presumption pre-death does.</p>		

QUESTION 7

We provisionally propose that the rule in *Parker v Felgate* should be retained.

Do consultees agree? (paragraph 2.95)

Yes:		Other:
<p>It is a useful, sensible and practical rule, which the courts have recognised and confirmed recently. It also reflects exactly what happens – instructions can often be given when capacity is clear, but failing fast. It is not always straightforward to make the will there and then. The rule facilitates will-making. Interestingly, the Rule does so in a way that we doubt the MCA could permit, without specific amendment.</p>		

QUESTION 8

We provisionally propose that:

- (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.
- (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 statute (which may be that contained in the MCA should the MCA test be adopted for testamentary capacity).

Do consultees agree? (paragraph 2.120)

	No:	Other:
<p>Clearly s. 42(1)(a) MCA permits the LC to issue guidelines of this sort. We would be very reluctant to see him/her do so.</p> <p>The Law Society and STEP already issue guidelines. I doubt whether the LC would improve much on them, and once issued they would be more difficult to adapt, than the Law Society's or STEP's guidelines.</p> <p>It is in any event an extremely difficult issue. Were draft guidelines produced by the LC, we could make a more sensible decision whether they were useful.</p> <p>But the real difficulty is that the combined legal and medical nature of the question of capacity means that it is not always entirely clear whether a lawyer or a doctor is a better judge. The lawyer does not have the benefit of medical insight, but the doctor will very rarely examine the testator on the extent of his estate or the claims of various potential beneficiaries. If the doctor does, it may be with the assistance of one of those beneficiaries or without appreciating that the apparently plausible explanations given are nonsense. Very interesting research has been carried out by Robert Hunter a solicitor at Edmonds Marshall McMahon (when he was at Herbert Smith), which tends to show that unexpected results can emerge from assessments by both doctors and lawyers. His research ought to be carefully considered.</p> <p>Nor do we regard the fact that the Golden Rule gives age as a factor which triggers a duty to advise the obtaining of a medical certificate, as discriminatory. The incidence of dementia undoubtedly increases with age. But the Golden Rule does not <u>prevent</u> the solicitor making the will. It merely requires him to advise the client to obtain a certificate, for good reason.</p> <p>Experience suggests that great care should also be taken in opening up, rather than narrowing down, the range of certificate providers. It is one thing to say that in some cases an expert in geriatric psychiatry should be involved. But far more dangerous to suggest that there are times when a social worker</p>		

should give an opinion.

QUESTION 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? (paragraph 2.120)

	No:	Other:
<p>s. 42(1)(a) MCA would not permit this. The professional will-preparer would not be the person assessing capacity.</p> <p>But nor do we consider that it helps. Solicitors already have guidelines. Unregulated will-makers are just that, unregulated. If the public choose to use them, they can hardly complain that they have not followed guidelines, and there would be no sanction against them if they did not.</p> <p>And why limit it to persons charging for their services (professional seems to narrow a term – many will-writers are not professional)? If what is sought is protection for testators, why not apply it to all persons making a will, save the testator him or herself?</p> <p>Such guidelines could complicate the process and result in wills not being made in time or at all, when they should be.</p>		

QUESTION 10

We invite consultee's views on the content of the code of practice. (paragraph 2.120)

We do not think we can contribute to this at this stage, in something of a vacuum, but would be happy to respond to a draft.

Oddly enough, the questions sketched out in para. 2.120 are just the sort of questions that a solicitor asks or should ask the client, but are unlikely to be questions that the doctor could confirm the truth of.

QUESTION 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? (paragraph 2.131)

Yes:		Other:
<p>If a testator wants to do this, s/he can. They do not need a scheme enacted to allow them to do so.</p> <p>We also have experience of a testator doing just this, on the advice of his solicitor, and everyone ultimately agreeing after the event that the certificate was unreliable. It is not a panacea.</p>		

QUESTION 12

We take the view that reform is not required:

- (1) of the best interests rationale that underpins the exercise of the court's discretion to make a statutory will;
- (2) of the way in which that discretion is exercised; or
- (3) to restrict the circumstances in which a statutory will can be made.

Do consultees agree? (paragraph 3.38)

	No:	Other:
<p>The best interests rationale is completely unsatisfactory, in its application to will-making.</p> <p>We are not convinced that this is the place to confront it, since we fear it will open a can of worms. But there should be no doubt about its serious shortcomings in both theory and practice.</p> <p>Best interests is a concept which we believe originated in relation to children. It has potentially very useful and important application in relation to the care and lifetime-issues of mentally disabled, though risks being discriminatory and not CRPD compliant.</p> <p>But it wholly fails to correspond to the will-making function of the COP. Best interests gives one no clue at all how to formulate testamentary provision for someone who has no capacity. And the courts have been hopeless in their attempts to wrestle with this issue, resulting in a complete fudge. And in a result which is probably not CRPD compliant, though the CRPD appears to assume that the person without capacity can be involved in the process. That is far to broad an assumption.</p> <p>While we are convinced that the best interests test does not work and does not help in the will-making context, we have no simple solution as to its replacement. We suspect that Senior Judge Lush's approach in Re JC [2012] was the most sensible. There has, however, been a series of High Court authorities expressing varying degrees of differing view, which is wholly unsatisfactory.</p> <p>Oddly enough, the expense involved in an application means that it is almost always in the best interests of the patient <u>not</u> to make an application for a statutory will at all. That is because the application uses up the patient's funds, without any corresponding benefit for the patient. But by the time of the hearing and the COP's decision it is too late to take such a point, since the expenditure has been incurred.</p> <p>We cannot, therefore, offer anything by way of solution. But 'best interests' is an extraordinarily unhelpful way of framing the court's will-making decision.</p>		

QUESTION 13

Consultees are asked whether there are 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 those are? (paragraph 3.41)

Yes:		Other:
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We suggest that for estates below a threshold – say £325,000 – the application should be a paper one, with a right to have an oral re-hearing at the costs risk of the party that insists on it.

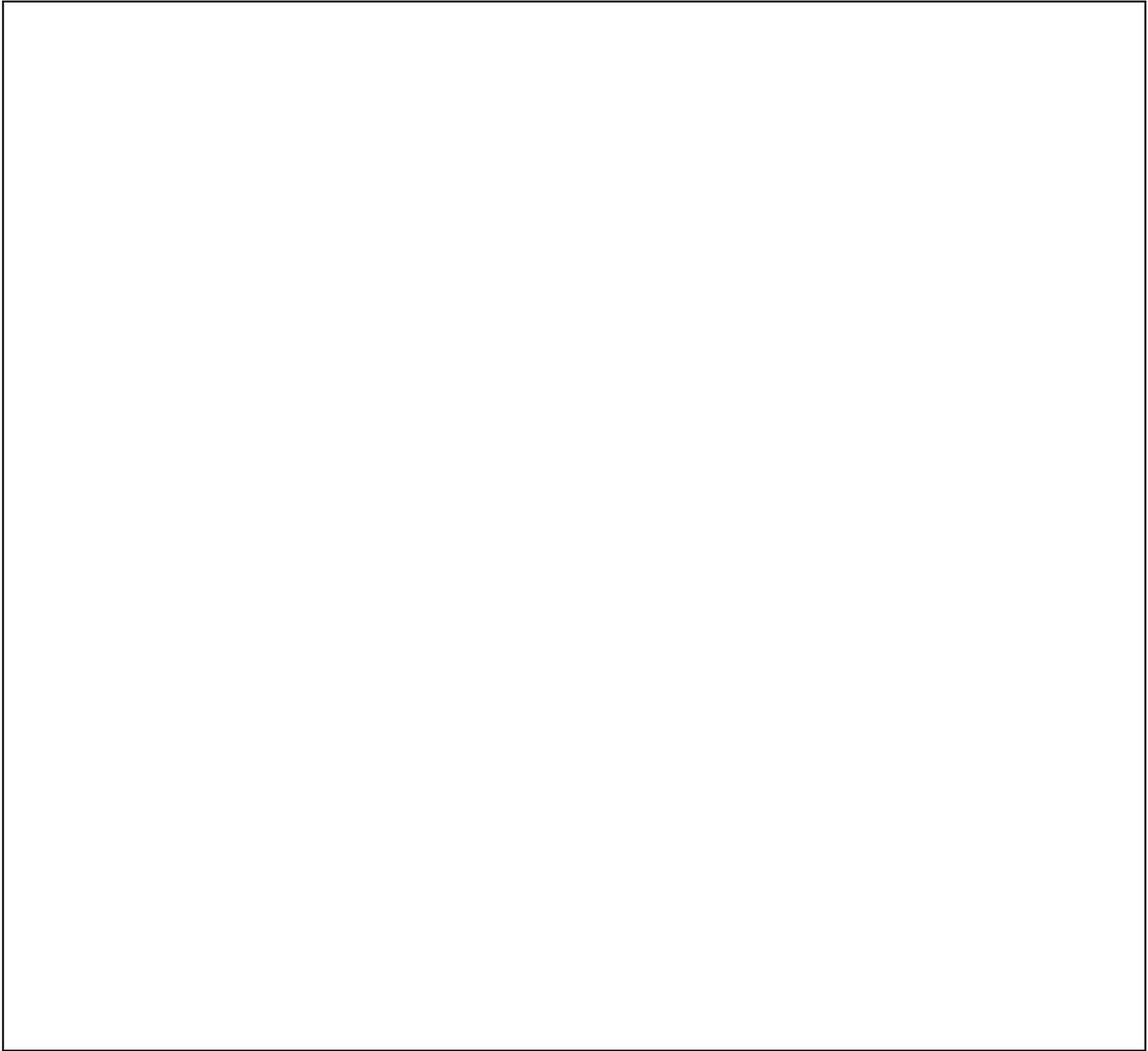
QUESTION 14

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

	No:	Other:
<p>There are a number of solicitors who do this very well. We consider that it would be better if the person involved sought them out, than sought out some form of non-legally qualified supporter.</p>		

If so, we ask for consultees' views on:

- (1) who should be able to act as supporters in a scheme of supported will-making?
- (2) should any such category include non-professionals as well as professionals?
- (3) should supporters be required to meet certain criteria in order to act as a supporter and, if so, what those criteria should be?
- (4) how should supporters be appointed?
- (5) what should be the overarching objective(s) of the supporter role?
- (6) how should guidance to supporters be provided?
- (7) what safeguards are necessary in a scheme of supported will-making? In particular:
 - (a) should a supporter be prevented from benefitting under a will?
 - (b) should a fiduciary relationship be created between a supporter and the person he or she is supporting? (paragraph 4.59)



QUESTION 15

We invite consultees' views on whether the current formality rules dissuade people from making wills. (paragraph 5.46)

Only very, very rarely. People make wills readily, at the drop of a hat it sometimes seems.

There are some cases where the will is not executed in time because of the complication of finding 2 witnesses. It does not prevent the preparation of a will, but it can sometimes frustrate the successful execution. There may be something to be said for permitting holograph wills, i.e. a will in the testator's own handwriting being accepted as valid, without witnesses, as in many other countries. The reference to formal notarial wills in France & Germany in para. 5.3 gives the impression that those countries have a higher degree of formality. That is not the full picture. In France, a will must either be a very formal notarial will, or be an informal holograph will which (from memory) must merely give the date and place of making it, as well

as be signed, provided it is written out by the testator. (Many states or regions have surprisingly different rules: if memory serves, in Navarra a non-notarial non-holographic will is only valid if it has 6 witnesses.)

There are times when a home-made will will only have 1 witness. That is usually through misunderstanding the process.

QUESTION 16

We invite consultees' views on what they see as being the main barriers to people making wills. (paragraph 5.46)

Old age, disability, solitary existence, unexpected death and lack of education. It is unclear what can be done, in terms of changing the law, to assist in these cases, save that the introduction of holographic wills may help in some.

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? (paragraph 5.55)

Yes:	No:	Other:
Yes, for the reasons given in the consultation paper.		

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? (paragraph 5.55)

Yes:	No:	Other:
<p>Yes, for the reasons given in the consultation paper.</p>		

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? (paragraph 5.55)

Yes:	No:	Other:
<p>Yes: there is no reason for different rules in these cases.</p>		

QUESTION 20

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

Do consultees agree? (paragraph 5.59)

Yes:	No:	Other:
<p>Yes, for the reasons given in the consultation paper.</p>		

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? (paragraph 5.59)

We do not think that gifts to the parents, siblings or other family members of a witness should be void. This would be a significant extension of the scope of the S.15 rule. The risk of fraud by the witness with the intention of benefitting family members must be significantly smaller than the risk of fraud where the benefit to the witness or his or her spouse. In our view there is an unquantifiable but significant risk that will cause more injustice than it saves.

If the rule is to be extended in this way, there should certainly be a power for the courts to save a gift to a family member of the witness in appropriate circumstances. However as noted below such a power may be difficult to operate in practice and may not effectively balance the different interests at play.

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. (paragraph 5.61)

If the S.15 rule is to be extended to cover the witness' family members, there should be a saving power. We also consider that there is a case even if there is no extension. The needs for two witnesses goes back so far that its origins are unclear, But if it is that it helps ensure that at least one witness may have survived to probate, then it may be ripe for relaxation, in specific circumstances, in an era when wills are made at much shorter intervals. The average time between a will being made and a person dying is currently approximately 9 months. And if there is to be a power to relax formalities, so that a single witness or no witnesses would not result in an invalid will, it is difficult to see why a power to save a gift to a witness should not be introduced.

This would be similar to the proposed dispensing power in relation to formalities. However it is important to recognise the difference between the functions of those powers. A power to dispense with formalities would allow the court to save an imperfectly executed will when it is satisfied that the document in question truly reflects the testator's testamentary intentions. It is easy to see how evidence might prove those intentions.

However a power to save gifts to a witness' family members would necessarily be harder to operate. It is easy to see how evidence other than from the witness may

demonstrate to the court's satisfaction that the testator signed the will. But what about safeguarding against undue influence? It has often been said that a party on whom such influence has been practised may genuinely intend and desire to act in the way that the influencer wants: the problem is with how that intention and desire have been produced.

If the court is only likely to exercise the saving power in cases where it is satisfied to the required standard that the testator both intended the gift to the witness' family member and that the intention was not tainted by the witness' undue influence, the evidential difficulties are obvious. Naturally, there will be clear cases either way. But what of the ordinary case where there is no particular evidence either way save for the witness' protestation that he or she has not acted improperly? Either the court should stick with the starting position that the gift is void, which risks frustrating the testator's intentions; or such gifts would be saved, meaning that the rule has achieved nothing. It would have achieved nothing because if there were positive evidence of undue influence, the gift would fail under the existing law anyway.

Nevertheless, there is something of a tension between presuming undue influence in the case of a witness, who may have a relatively small benefit, with no power to relax that, and not presuming it in other analogous cases (such as being involved in the preparation of the will – though it is our recommendation that that should raise a presumption).

A case may give a useful example of the potential for injustice. A testatrix wished to leave her estate equally between her three daughters. The family together prepared a will, on a pre-bought form. The witnesses were two of the husbands. The gift to those two would have failed. Two-thirds would have passed on intestacy and been divided three ways, so one daughter would have received 55% and each of the other 22%. That would have been bad enough. But a further codicil was executed, making a minor change. This time only one of the husbands witnessed. The other witness was a third party. That validated the gift to the daughter who husband had witnessed the will, but not the codicil. So now the split was 44%, 44% 11%. The two sisters who received 44% insisted on their rights. The Inheritance (Provision for Family & Dependents) Act 1975 was of no assistance. Rectification does not work either.

QUESTION 23

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

Do consultees agree? (paragraph 5.66)

Yes:		Other:
Unquestionably. It is unclear what it, if anything, adds.		

QUESTION 24

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

- (1) 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
- (2) apply in all cases, including those where the witness acknowledges his or her signature in the testator's presence. (paragraph 5.66)

QUESTION 25

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

Do consultees agree? (paragraph 5.74)

	No:	Other:
<p>We know of no evidence that holograph wills do not work well abroad and are a little surprised that they should be dismissed without any evidence-basis.</p> <p>Given that they appear to be the most common type of will in Germany (and Scotland has an even more relaxed form of will), it is unlikely that there is anything to fear in adopting them.</p> <p>The fact that such wills are to be found in civil law jurisdictions is not a factor which argues against them being adopted in a common law jurisdiction. Some 25 of the states of the USA permit holographic wills, without having a civil law system of succession.</p> <p>Furthermore, many people from foreign jurisdictions are used to the concept of holograph wills. If they make a holograph will in this country, it will be valid</p>		

if they retain their foreign citizenship.

It seems odd that the same opportunity is denied to UK citizens living in England & Wales, or Northern Ireland.

In fact, it is not wholly denied: if that person is in a country where holograph wills are recognised when he makes it, then it is, surprisingly, valid in England & Wales.

This would probably be most satisfactorily solved if holograph wills were valid in this country.

Nor is the requirement for two witnesses any real bastion against undue influence. Experience shows that the influencer will almost always supply the witnesses, who can be relied upon not to ask too many – or any - questions

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? (paragraph 5.80)

Yes:	No:	Other:
<p>We have little knowledge of how prevalent e.g. the merchant shipping wills are. We are aware of one case recently where such a will was upheld. If the system is tightened, it will be inevitable that some people will not be aware that it has been tightened. We are concerned that could leave people out in the cold. If, as we think, holograph wills should be permitted, there may be something for retaining this anomaly too, though anomaly it is.</p>		

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. (paragraph 5.90)

It is very common, in our experience. It is impossible to give percentage figures, since at the Bar we tend to see the cases which have gone wrong, or are outside the norm. We imagine that in any given year the number of wills invalid for non-compliance with formalities will run into the hundreds. We suspect far many more wills are invalid, than are found to be invalid. The presumption of due execution (a good and useful presumption) often masks invalidity. *Channon v Perkins* 2005 and *Re Chapman* 1999 are 2 relatively recent examples which spring to mind of the presumption of due execution overriding the convictions of the witnesses that they were not present together when the will was signed. Proofing the witnesses is a surprisingly successful way of overturning a will.

Solicitors make mistakes over formalities, but it is the homemade wills which seem to suffer the most. A stark example is *Humblestone v Martin Tolhurst Partnership*. There the will was prepared by solicitors and sent to the client to execute, with instructions how to do so. He instead delegated the witnessing to his wife, who arranged for her parents to witness a will her husband had not even signed. One might think that people who cannot help themselves, should not be assisted by flexibility in the law, but in that case the disappointed beneficiaries sued the solicitors' firm successfully for damages. That is not the right way to deal with a case of this sort. If it can be proved to a court's satisfaction what the testator intended to do, then those wishes should be carried out, not fall to be picked up by insurers – if any insurance is available.

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? (paragraph 5.105)

Yes:	No:	Other:
<p>We regard this as an extremely sensible and just proposal, which we wholeheartedly support. Sadly, far too often the testamentary wishes of the Testator are frustrated, and the Testator's family, friends or chosen charities deprived of their intended inheritance, even though it is absolutely clear what the Testator wanted. This reflects no credit on a legal system. Giving the court a power to dispense with technicalities would be a vast improvement.</p>		

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? (paragraph 5.119)

Yes:	No:	Other:
<p>Certainty the Will Register has in the past few years developed a commercial register (and search systems both within and outside the register) which are already performing very well. There are some 7 million Wills registered with them. They have overcome previous industry resistance to will-registration, and provide a good national service. It is voluntary, but it is working on a large enough scale. The Government already provides a voluntary service, which has very low take-up. Were the Government to provide a compulsory system, it could not fairly or properly prevent the use of Certainty's Will Register, so would have to make registration compulsory at either the Government's system or Certainty's (presumably by making registration with the Government system compulsory for wills not registered with a commercial one). We doubt whether that would be an appropriate step to</p>		

take. It also would have the opposite effect to that intended. Rather than improving the chances of a will being admitted to probate, it would lessen the chances, since someone making a homemade will, or an incompetent solicitor or will-writer, might not be aware of the need for registration.

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? (paragraph 6.43)

	No:	Other:
<p>We do not believe that it is sensible for Parliament to legislate for circumstances of which it is not currently aware, to meet a need which does not currently exist.</p> <p>We consider that there are far too many unknowns and imponderables about electronic wills, and that it is far too early to go down this road, even in such a preliminary fashion. Paper is a particularly suitable medium for the writing and preservation of a Will, and the authentication of it, too. We certainly see no case for jumping into the unknown, and do not favour, nor see any case for, authorising the Lord Chancellor to take such a significant step without full consideration.</p>		

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).

Do consultees agree? (paragraph 6.45)

Yes:		Other:

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. (paragraph 6.87)

<p>(1) Currently, there is absolutely no demand, of which we are aware, for electronic wills.</p> <p>(2) These are beyond our competence, but we suspect they would be substantial.</p>

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? (paragraph 6.97)

Yes:	No:	Other:
<p>(1) We suspect it is not an acceptable consequence. Most people would think that by deleting the electronic will, or destroying the telephone, they might have revoked the Will. A very simple method of revocation is a distinct advantage of the paper process.</p> <p>(2) We suspect it would potentially make it very difficult to know which version was the actual original, when there might be differences.</p>		

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. (paragraph 6.106)

<p>We disagree with an enabling power. If such power were to be included, we would not see any reason to exclude provision for video wills.</p>

QUESTION 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? (paragraph 7.76)

Yes:	No:	Other:

QUESTION 36

We provisionally propose that the general doctrine of undue influence should not be applied in the testamentary context.

Do consultees agree? (paragraph 7.105)

	No:	Other:
<p>The only difficulty, it seems to us, with applying the general doctrine, is that the presumption of undue influence (which is what is being applied) carries with it the requirement for a transaction/gift the size or nature of which requires explanation. But on death one's assets must pass somewhere. There is nothing which corresponds to the surprise or shock that someone giving away all of his assets (or his most valuable asset) during his lifetime, since that is exactly what a will does in the normal event.</p> <p>We consider, and the Law Commission appears to agree, that might be possible to replace it with a slightly softer test, such that the burden of proof is shifted if the gift is one which is unexpected or surprising in the context (though greater care would be needed over wording, of course).</p> <p>We therefore regard it as feasible to apply the general law with that significant modification. Once that adjustment is made, then the inter vivos undue influence model fits perfectly happily with Wills, we believe. It is also consistent the general approach of the Courts to unify the treatment of wills and other transactions rather than pluralise it (see for example <u>Marley v Rawlings</u> in terms of the approach to construction of wills – to be no different to the construction of contracts). We consider that the doctrines of undue influence applicable to lifetime transactions and wills should be as close as possible.</p> <p>That harmonisation would avoid the blot on the law which currently exists, where a lifetime transaction in favour of a rogue can easily be set aside, only for the asset to pass back to the rogue under the will he has obtained, in relation to which the much higher hurdle of undue influence for wills applies.</p> <p>The current lack of an evidential presumption of undue influence in relation to Wills is difficult to justify. The apparent justification for the requirement of proof rather than presumption, is that a Will may only be set aside by reason of undue influence where actual coercion is demonstrated. But it is because of the absence of evidence from the testator in such cases, that the presumption is in fact most needed in cases where the victim of the undue influence, the testator, is no longer able to give evidence of it. Almost invariably the means by which the undue</p>		

influence is exercised will be unknown to the disappointed beneficiary, who has lost their inheritance by reason of it. It will happen behind closed doors. However, the surrounding circumstances may excite suspicion, sometimes to a very high degree, and yet short of cogent evidence of actual fraud, the perpetrator of the undue influence is beyond reproach.

It is difficult to justify the current distinction between undue influence and other challenges to wills based upon want of knowledge and approval or want of testamentary capacity. Both the latter will see, in certain circumstances, the evidential burden of proof switch to the person propounding the will (if reasonable doubt is raised as to capacity, or the circumstances of the making of the will excite suspicion in the case of knowledge and approval).

At present the different approaches produce anomalous results. Consider the case in which the party suspected of undue influence (“D”) is closely involved in both the preparation and execution of a will and a gratuitous inter-vivos transfer or settlement of property by an elderly testator known to be suffering from dementia (“T”). In a challenge based upon capacity the evidential burden will be upon D. The test of capacity will be substantially the same for the will and the transfer, if the property transferred is T’s most valuable asset (see Re Beaney). The circumstances may give rise to suspicion such that D must also discharge the burden of establishing that T knew and approved its contents. If D is someone in whom T reposed trust and confidence, perhaps falling within the class of persons where undue influence will be presumed, the inter-vivos transfer or settlement will be subject to the presumption of undue influence which in certain circumstances may carry considerable weight as to the outcome: see for example Re Smith [2014] EWHC 3926 (Ch). In those circumstances it is difficult to understand, let alone explain to a lay person, why the law should single out the undue influence claim for a separate legal test such as to render it, effectively, next to incapable of being alleged. All the other heads of claim will see the burden placed upon D.

Although it cannot be said necessarily that the outcome of a particular decided cases would necessarily be different if the presumption existed in the context of wills, there are numerous cases in which the presumption would have had a significant utility for the course of a case: see for example Hubbard v Scott.

It would also go against the grain of the comments in the case of In the estate of Fuld and elsewhere that essentially the law of capacity, knowledge and approval and undue influence in the case of wills are entwined and often merge into one another. That the evidential burden of proof should differ between the different heads of claim is an unnecessary anomaly.

QUESTION 37

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

Do consultees agree? (paragraph 7.129)

	No:	Other:
<p>It follows from our answer to the above that we do not agree with the creation of a statutory doctrine, but favour adoption of the common law doctrine in relation to inter vivos transactions, coupled with a reformulation of the test of a testamentary gifts which calls for explanation.</p> <p>It seems that the Law Commission shares the view of the need for a presumption of undue influence in testamentary cases, in that the recommended statutory code would include a statutory presumption in certain circumstances.</p> <p>It is difficult to see in practice, therefore, the meaningful differences between the adoption of the new statutory code and simply bringing the law of undue influence in a testamentary context into line with that in a non-testamentary context. But if there are any, there would necessarily be some miss-match between a new and different statutory code and the current doctrine for lifetime transactions. That seems to us to be a real drawback, for which we can see no justification.</p> <p>But if, contrary to our strong view, the inter vivos doctrine is not simply carried across, then we definitely favour a new statutory code against leaving things as they are. Leaving the status quo in place would be the worst outcome.</p>		

QUESTION 38

We invite consultees' views on:

- (1) whether a statutory doctrine of testamentary undue influence, if adopted, should take the form of the structured or discretionary approach.
- (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. (paragraph 7.129)

<p>Our short answer is as follows: if the inter vivos model is not to be adopted, we favour a discretionary approach (but with the addition of certain specific relationships being identified as automatically raising the presumption). We fear that the structured approach, particularly given the fact that it must be presumed to be different and distinct from the inter vivos model, will risk being over-constrained by the courts.</p> <p>We strongly believe that a careful reading of the parts of the Report which cover the structured approach and the discretionary approach, shows the</p>
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dangers of trying to re-invent the wheel, which the Law Commission has fallen into by deciding not simply to adopt the inter vivos model.

Firstly, and starting at the end, we cannot see any reason at all to exclude spiritual advisors from the presumption. A glance at the great case of *Allcard v Skinner* shows that not only did the plaintiff hand over large sums to, but she had previously made a will in favour of, the Mother Superior. As Lindley LJ said there: *“But the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far.”*

On the facts, the plaintiff revoked the Will when she left the religious order, and lost her claim for assets transferred on the ground of laches. But the lesson to take from it is that it is not sensible to have a presumption that applies to the lifetime gifts, but not to the will. Nor do we believe that spiritual influence has lessened in the 130 years since *Allcard’s* case.

We note the specific categories only include someone who prepares the will on a charging basis. So if the solicitor does not charge (as often they do not if benefitting too), he falls outside the presumption. We would not regard that as satisfactory.

We note that the specific categories do not include a person who is managing the testator’s affairs, typically an attorney under an LPA. In inter vivos undue influence, this is a separate recognised category where undue influence is presumed, without further factual proof of position of influence. It is, of course, natural that an attorney under an LPA should consider will-updating. But if, as we assume, the attorney is intended to be within the presumption (as someone with a position of trust and confidence), it would be appropriate for that relationship to be specified. It is perhaps the most common position which is abused.

We also respectfully agree with Professor Kerridge that the person involved in the making of the Will ought to be within the presumption. It is quite true to say that there is no reason why one should not take one’s relative, or the person who has told you they want to make a will, into a solicitor’s office. But it is also our consistent experience that the person who does that is often doing it for their own advantage, and as part of a scheme which amounts to undue influence. Typically, the beneficiary will already have started assisting the testator at home. The solicitor may be one who does not know the testator, but has strong commercial links with the accompanying beneficiary. The beneficiary may sit in on the meeting, which the solicitor finds hard to resist. This must happen dozens of times a year, across the country. If the solicitor does his or her job properly, the presumption will be overridden. But it is exactly the sort of case which we believe needs a presumption.

If the person draws up the will him or herself, without using a solicitor, then on the Kerridge proposal, they will face the burden of proving that there was no undue influence. This we regard as the acid test of the proposed undue influence regime, since this is where the real problem lies. What is to be the Law Commission’s response to it? There may be no great or obvious trust or

influence. Typically it is a neighbour, or a jobbing builder working up and down the street, or one family member more grasping than the rest. But if they have taken it on themselves to prepare the Will they say the testator wanted, why should they not take on the burden of proving it is indeed what s/he wanted?

One of the problems lies in the fact that want of knowledge and approval has, in our view, been watered down too much by the Courts in recent years. A prime example of this is *Hart v Dabbs*. The will there was upheld, even though prepared by the residuary beneficiary, and signed with the operative parts covered up. The beneficiary was (as the judgment reveals) suspected of the murder of the testator. He avoided giving evidence probably so he could not be cross-examined on the murder. There was evidence in his favour adduced at the very last minute of his fiancée, which the judge, perhaps surprisingly, accepted. But the will was upheld largely because the testator could have had the opportunity to read the will the beneficiary had prepared. Not because of any real evidence that he had. That decision has been relied on in subsequent cases in the Court of Appeal such as *Fuller v Strum*.

If a structured approach were adopted, we are also convinced that the court ought to take into account the size and nature of the gift, particularly in the context of the relationship with the beneficiary and the previous testamentary wishes of the testator. We are not talking here about modest gifts, but about substantial ones (in proportion to the estate) where they will almost immediately strike one as astonishing. A typical scenario is an elderly solitary testator, without close family, who has a history of wills in favour of selected charities, but who then at the last ditch leaves his/her house to a neighbour, or someone who has started to do his/her shopping. No reason at all why they should not, if that is what they really want to do. But suspicions are naturally aroused: the normal approach would be to start with a modest legacy towards the start of such a relationship, increasing it to a larger legacy as it continues. Yet we have seen such a case where a gift worth millions of pounds is given to a woman, whose husband only came in for £3,000 legacy 6 months earlier under the second last will, in which she received nothing. The nature of the gift, in context, needs to go into the balance.

The nature of the gift is not included in 7.119. Oddly, however, it appears from 7.129 that the nature of the gift ought to be a consideration.

QUESTION 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. (paragraph 7.136)

Yes. If the presumption of undue influence arises, costs should not automatically follow the event, as they do today. The court should have a wider discretion to make alternative costs orders. Typically, they might follow the Kostic model, but should not be strapped too firmly into it. There will be occasions when the prima facie appearance of fraud is so strong, that if the will is upheld at trial, the losing party's costs ought to come out of the estate, at least up to the moment when witness statements are exchanged. *Cowderoy v Cranfield* is a fine example. A firm of solicitors had refused to act on the will, because of real concerns of undue influence. They had been sacked. Their advice to obtain a medical certificate rejected. Anyone turning up at trial would have expected the will to be declared invalid, but the evidence on the day convinced the judge. Oddly enough the relationship with the testatrix there (drinking companion of testatrix' son) would not have raised a presumption, but the general circumstances still looked very suspicious indeed. The current law on costs, applied in *Cowderoy*, is that the successful party "*should not bear the costs of clearing his name*". If a presumption applies, we consider that option should be open to the judge. Nor do we consider it satisfactory to leave it to the judiciary to re-calibrate the costs approach. The "*clearing one's name*" argument would still have some apparent force, so the issue should be dealt with.

QUESTION 40

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

- (1) knows that he or she is making an will;
- (2) knows the terms of the will; and
- (3) intends those terms to be incorporated and given effect in the will.

Do consultees agree? (paragraph 7.149)

Yes:	No:	Other:
<p>We would agree with this, if Kerridge's suggestions were to be incorporated into the undue influence proposals, as we support above. If they are not, then want of knowledge and approval needs more teeth, rather than less.</p>		

QUESTION 41

We provisionally propose that the age of testamentary capacity be reduced from 18 to 16 years.

Do consultees agree? (paragraph 8.28)

Yes:	No:	Other:
<p>Yes, though we do not recognise any real demand for such a change. We do, however, consider that if a 16 or 17-year-old owns assets, s/he should be able to determine what will happen to them on death.</p>		

QUESTION 42

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

Yes	No:	Other:
<p>This seems to us a difficult issue for which there is little practical demand or need. The 2 Australian cases would be covered by a reduction in age to 16.</p> <p>In theory, we readily there might be something to be said for such a court power, though we acknowledge the practicalities are far from straightforward.</p> <p>On the other had, we recognise that there can be grave concerns about children who receive personal injury awards being faced with the possibility that part of the award may devolve on their death under 18 (under 16 if the law is changed) on a parent who has abandoned the child or may be responsible for the injuries.</p> <p>On balance, therefore, we consider that such a power is probably sensible. We do, however consider that if a court has power to authorise the child to make a will, then the court should also (a) be given power to make a will if not satisfied the child has full understanding and (b) the court should be given an alternative power to settle the child's assets on the child's behalf.</p>		

If so, who should be allowed to determine an underage testator's capacity at the time the will is executed? (paragraph 8.44)

We are surprised that it should be suggested that if the solicitor or other will-writer was to determine capacity, it would “force children to have wills professionally drawn up” as if that was some disadvantage. It would undoubtedly be cheaper and easier than the use of a court, and “allowing” a court to determine capacity would force the child to go to court, probably the last thing the child wants to do. By the time it gets to court, the child may even have reached the age of 16.

But we instinctively are not attracted by the idea that a solicitor can empower someone to make a will. Would the solicitor be liable to action if he got the decision wrong? It would probably be better if the child made the Will, and his or her capacity was assessed post-death, if need be, with the benefit of such evidence as could be provided – of which a solicitor’s/psychiatrist’s evidence might be just the thing.

On balance, therefore we consider that the court is probably the right place, in those very rare circumstances when the need will arise. But if it does arise, the court ought to be able to make a will for the child (or even settle the child’s assets), if not satisfied that the child has capacity him or herself.

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? (paragraph 9.43)

Yes:		Other:
<p>The courts currently interpret first, and only rectify if interpretation does not get to the rectified answer. That works perfectly well in practice. Indeed in Parkinson v Fawdon it saved time, trouble and costs, because the judge interpreted the will on a paper consideration, and no trial was necessary</p>		

QUESTION 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. (paragraph 9.43)

No. None.

QUESTION 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? (9.47)

Yes:	No:	Other:
<p>This is a mild “No.” The sections rarely operate, but their wording appears to have stood the test of time. Their scope is technical, so are only ever likely to be considered by specialists.</p>		

QUESTION 46

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

- (1) any of those provisions are obsolete;
- (2) any of those provisions require substantive alteration; and
- (3) if any provisions are obsolete or require substantive alteration, what changes are needed and why. (paragraph 9.47)

We suspect that s. 29 is obsolete, and a number of the sections (ss. 23, 25, 26, 28) are no longer referred to. But that may be because those sections have been in play for so long that the legal positions they set out are thought now to be part of the common law, and it is forgotten that they were introduced by statute in 1837. If the sections are revoked, where does that leave the legal position? Does that mean, for instance, that a failed specific devise will no longer pass as residue? That would not be helpful at all.

A similar problem occurred in relation to mines, with TOLATA's repeal of s. 28(2) Law of Property Act 1925. The provision was thought to be of little current use (effectively allocating mining receipts between life tenant and capital). But its repeal has restored a default position where the 1925 clarification section is no longer in force, so we are back with pre-1925 law, which was thought then to need change because of its impenetrability. The Law Commission missed the opportunity to correct that at a later review "*The classification of other categories [of receipts] such as timber, minerals and intellectual property rights is less clear, but does not appear to cause wide-ranging problems in practice*" (Consultation Paper No 175, para. 5.13). We acknowledge that we did not give the Law Commission any assistance at that stage, because none of our members had then come across the problem. Simply because something may not be expected to cause wide-ranging problems in practice, does not mean it should be actioned.

QUESTION 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. (paragraph 9.47)

	No:	Other:
<p>We are not clear what will be the result if it is repealed Will a devise to trustees no longer pass the fee? Will we have to go back to pre-1837 law to work out what happened then, and apply it today? That is the logical result of repeal, and is unattractive.</p> <p>We have no practical experience of its operation, but do not regard that as the appropriate test.</p>		

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QUESTION 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. (paragraph 9.47)

Yes:	No:	Other:
<p>While it seems unlikely that repeal of this section would create difficulties, and the exact ambit of the section is obscure to us, we see no practical advantage in clearing it off the statute books.</p>		

QUESTION 49

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

If so, please state:

- (1) what problem the new provisions would address; and
- (2) why that problem is inadequately addressed under the current law.

Please also give an example of a case in which the problem has arisen where possible. (paragraph 9.55)

Yes:	No:	Other:
<p>The meaning of geographical/national terms. It would be useful if they could be interpreted loosely, in particular where otherwise there is no property which falls within the specific gift at the date of the will or death.</p> <p>Typically, someone will use a term such as England, Britain, the UK, without realising that it may not include Isle of Man or the Channel Islands. Or when they move money to one of those locations from onshore, they do not appreciate that they need to change their will.</p> <p>One of our members has had experience of this twice in the past 10 years, where what were the relatively clear intentions of the Testator are potentially frustrated. There has been a recent case which approached the concept of the UK rather more flexibly, but it is only one case at first instance.</p> <p>This highlights the shortcomings of section 21 AJA 1982, which in our view is in serious need of being made more fit for purpose. The words "bank accounts in</p>		

United Kingdom” are not meaningless. They have a meaning, but it so happens that that meaning does not strictly include bank accounts in the Isle of Man. It may be that the testator had no bank accounts in the UK, but that does not that the words are meaningless in absolute terms. Nor is there anything patently ambiguous about the term “UK”. It has a definite and certain meaning. Does the fact that there may be no bank accounts in UK, but are in IOM, give rise to a latent ambiguity? Arguably not. It tends to demonstrate that someone was mistaken about whether IOM was in the UK or not. So s. 21 cannot help. (But nor can s. 22 since the mistake is not within its ambit). It would be immeasurably more helpful if s. 21 was merely triggered by some doubt or uncertainty about the will’s interpretation or effect. Cases where the testator’s intentions are 100% clear on the file (though not on the Will) are unfortunately dogged with painful and unnecessary arguments about meaninglessness and ambiguity.

We do not consider that there is any need for concern about the technical meaning of words like bequest and devise. The specific meanings of each are lost now in time. A bequest of residue would never be construed to dispose only of personalty.

The example given in relation to shares is, however, a good one. It covers very similar ground to ademption, and a good new anti-ademption provision would sweep up these questions too. What is more difficult is to be confident that the “intentional approach” to interpretation would interpret a gift of 100 shares as a gift of 200 following a split, between will and death. S. 24 of the wills Act 1837 would probably override the intentional approach here.

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.

Please also give an example of a case in which a problem has arisen where possible. (paragraph 9.62)

Yes:		Other:
<p>We regard this as a most important change that needs to be effected to the law of wills, which will have the capacity to right more wrongs than any other proposal (apart from the power to dispense with formalities). The Law Commission would be losing an excellent opportunity, if it did not expand the law of rectification now. It desperately needs expansion, though we would not call it expansion. We would call it releasing the remedy from unnecessary shackles which should never have been applied in the first place and which do not</p>		

apply to common law rectification.

The problem the expanded doctrine of rectification would address is the failure of s. 22 to allow the testator's true intentions to be given effect to by rectification, save when there has been a clerical error or a failure to understand instructions. That means, among other things, that professional errors and the testator's own errors cannot be corrected, even though there is perfectly clear evidence of them.

That problem is inadequately addressed under the current law, because of the artificial imposition on the remedy of rectification, as it applies to wills alone, of the requirement that the failure to give effect to the testator's intentions must have arisen from clerical error/failure to understand instructions.

We think it would be serious mistake to allow this great opportunity to pass by without correcting what is one of the greatest defects in the Law of Wills.

It is particularly important to do so, since Lord Neuberger in *Marley v Rawlings* raised the possibility that the common law remedy of rectification does apply to wills – he thought it did before the AJA 1982. Clarification, at the very least, is needed.

But the limits on will rectification are disappointing. They have a purely historic background, which is unnecessarily intricate to trace. There was no error, as suggested in para. 9.57. But the simple fact is that where mistakes have occurred in the will-making process, and the evidence clearly shows (as it must) that someone has lost out and someone has benefitted when they were not intended to benefit, we regard it as wholly unjust and indefensible that statute only allows a remedy if there is a clerical error or a failure to understand instructions.

There have been examples of this in reported cases, but far more in cases which have not gone to court because it is quite obvious that s. 22 cannot apply, although it is also quite obvious that that a mistake has occurred.

Nor is it satisfactory to say that the person responsible for the mistake's insurance company will pay up. The mistake may be the testator's, in communicating his wishes. The will-maker may be uninsured. *Walker v Medicott* (below) shows an insured solicitor may not be found liable. But even if insured, how is it either logical or fair to place on his insurance policy a mistake which is a professional error, but not one which is a clerical error? Someone has received a complete windfall, while a solicitor has to make up a loss to the disappointed beneficiary, at a huge increase to his premiums. There is no justice in that. We are wholly unconvinced about the suggestion in para. 9.60 that the "*appropriate*" action is a negligence one, not a rectification one. Why? That omits to take into account the fact that one person is walking off with a benefit he was never intended to receive. Take *Marley v Rawlings* as an example: if the Court of Appeal decision had stood, and there had been no rectification, the solicitor who had made a very simple error (made surprisingly often) of presenting the wrong will to each of the husband and wife to execute, would have had to pay out large sums via insurers, who would then have increased their premiums till the money was recovered, while the very children who had turned their backs on their parents during their parents lives, such that the parents had decided to exclude them from benefit altogether, would take their parents entire estate. We do not regard that as "*appropriate*". It is a state of affairs which serves to protect – for no apparent reason - the wholly unintended inheritance to the undeserving, at the solicitor's expense.

Nor can we see any current justification for the fact that a clerical mistake allows rectification, but not a “professional” one? There may be an obscure historic reason. It may be that in 1982 it was feared that floodgates would open. But experience has shown that it can be very difficult to distinguish between clerical and professional errors. Indeed the courts have probably stretched the word “clerical” about as far as it can go, if not further. It is an unnecessary, arbitrary and often unclear distinction.

We are also wholly unconvinced by the argument at para. 9.61, that if the term “failure to understand instructions” was expanded then there would be a “*second bite at the estate-planning cherry*”. This is apparently a quote from an article by in Current Issues on Succession Law. While we have not been able to access this article, we cannot accept this argument. For a start, it seems either to ignore or be wholly unaware that there is always, post-death, a second bite at the estate planning cherry, authorised and facilitated by Parliament, in s. 142 Inheritance Tax Act 1984 (and an identical provision for CGT). When that second-bite is not possible, because one or more relevant beneficiaries are under the age of 18, the court is accustomed to approving will-variations on their behalf. Given that Parliament and the Courts already encourage and enable second bites at the cherry, we cannot understand (a) why the author of the article would regard that as a bad or undesirable thing, and (b) why s/he thinks that a court application for rectification will enable any second bite at the cherry, which cannot now already be achieved much more cheaply by a simple deed of variation under s. 142. Rectification principally exists to cater for non-consensual changes to the terms of the will, where parties are not acting in concert, but insisting on their rights on the actual wording of other will, when cogent evidence shows that that was not the testator’s intentions at all.

The last sentence of 9.61 states that “Rectification should not be a means to protect testators from unwise estate planning decisions”. We see no scope for it to be so used, and believe that this must arise from a misunderstanding. Rectification always is used to correct the wording of a document so it corresponds with the intention of the party or parties as to what ought to have been in the document. It is not used to make a different document, which the party or parties would have preferred. The law reports abound with instances where the court will not give common law rectification of an estate-planning document such as a settlement, which would bring about the result the party or parties wished, but did not actually intend: see e.g. *Allnut v Wilding* 2007 CA. There is absolutely no reason to suppose the courts would approach wills any differently.

As for examples of occasions when the narrow scope of rectification has caused injustice: our members have had many. Here is a current one. **Please do not publicise it.** The will gives the Deceased’s partnership interest in the family farming business to his daughter, who farmed with him. The attendance note reads something like “land & partnership to daughter”. The land is very valuable. But it was not a partnership asset, so is not included in the express words used in the Will. Without it the daughter cannot farm. There is clear evidence that the deceased thought his residue was of very little value, effectively the money in a personal bank account which was not specifically left. He left residue to other relatives. If there was a clerical error in either reading the attendance note or omitting the word “land” from the will, it is rectifiable. If the error was that the solicitor thought that the farm was an asset of the partnership (which it was not) it

is not rectifiable. The solicitor is no longer with the firm. He may not even remember. Nor is there any adequate solution, if rectification does not run. Although the solicitors' firm is probably on the hook, they only pay out cash. The farm goes to the other side of the family. As a complete windfall. The intended beneficiary is left with a cash pay-out and the hope that she may cut a deal with the unjustly enriched relatives, that allows her to stay at the farm, and the solicitor has to pay much increased premiums (which, depending on claims record, may drive him out of business).

Walker v Medlicott is another fine example of the shortcomings of s. 22. The testatrix told 8 people before she made the will, and 9 after it, that she had left her home to her favourite nephew, Bob. She told him after the visit to make the will: "Well, Bob, I've signed it, the house is yours". In the solicitor's will file, there was a handwritten note, saying – "House and contents to Bobbie". The judge held that there was no failure to understand instructions: the judge took the view that the testatrix simply cannot have told the solicitor in the meeting that she wanted her house to go to Bob. That was a professional negligence claim, which failed. But on the facts, rectification would not have succeeded either. That was despite the evidence of the testatrix's intention being absolutely bomb-proof. She fully meant to give her house to Bob, and thought she had. But she hadn't. Despite it being entirely clear afterwards what she had wanted, the court was powerless to correct the will so that it effected what she wanted. And the court was not even able to recompense Bob for the inheritance he had lost.

The law allows rectification of massive commercial contracts. Trusts and settlements are fully rectifiable. We find it impossible to understand how the current fetter on the power to rectify wills can be justified.

QUESTION 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? (paragraph 10.42)

Yes:	No:	Other:
<p>We agree that the Deputyship exclusion from ademption should apply also to attorneys acting under LPAs.</p> <p>We are not convinced that it is helpful to add the extra caveat that the donor must lack capacity. If the donor has capacity he can, and probably will, dispose of the property himself. The main risk of this sort of ademption arises from the over-enthusiastic attorney, who does not consult a solicitor about the succession repercussions, and who often stands to gain by the ademption.</p> <p>It is no comfort to say that the attorney will be able to establish lack of capacity, since – on this premise – it is not in his interests to do so. And even if the attorney is not financially interested, why should the lack of capacity itself be determinative? In reality the critical question is whether the donor knew that the transaction was</p>		

going through. That is not the same question. The other critical question is whether the donor intended to adeem/destroy the gift. Generally speaking that is very unlikely. We would tend to favour ademption applying whenever an LPA is used. As a general rule, they are only used on big decisions when the donor has become incapable. It would be possible to make an exception – so that ademption applied if it could be proved that the donor had capacity and knew of the gift.

QUESTION 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:

- (1) has been sold but the transaction has not been completed; or
- (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? (paragraph 10.52)

Yes:	No:	Other:
<p>We regard this, with respect, as making a lot of sense. Ademption in these two cases currently applies, we suspect for two related reasons: [1] the law used to regard the doctrine of conversion as of huge importance. Land subject to a sale contract was deemed to be converted into cash. That may be a lawyer's interpretation, but it would not be a layman's. And even a solicitor advising might only tell the client once the sale was complete to revisit his/her will. [2] It also goes back to the dichotomy between the rules of succession relating to land and to personalty. The personalty devolved on the heir at law, and personalty on the next of kin. That made the distinction between land and personalty of particular importance. If the deceased had contracted to sell, then it was easy to see that there was no land to preserve for the heir at law, so the proceeds should be divided between the family more fairly. This is all long in the past. Excluding ademption would get us closer to the testator's intentions. We do not consider that anyone sells land in order to defeat their expectations of their heirs.</p>		

QUESTION 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 of the gift has changed form due to dealings of the company which the testator has not brought about.

Do consultees agree? (paragraph 10.61)

Yes:	No:	Other:
<p>We also suggest that there should be an exclusion too where bank accounts have changed but are traceable, see below.</p>		

QUESTION 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? (paragraph 10.64)

Yes:	No:	Other:
<p>This is a difficult question. We can certainly see that there is great merit in the legatee being entitled to the insurance proceeds relating to that asset. We are not sure that that is the status of the law at present. If it is not, it should be and even if it is, clarification would be welcome. We would support a legislative provision to that effect.</p> <p>But if the asset is destroyed uninsured, we consider that the loss should probably lie where it falls. This proposal seems to us not to represent anything to do with ademption, but some form of statutory compensation. It is far from clear to us that it is logical, workable or responds to any perceived injustice. Specific items capable of being destroyed are usually given not for the value they have, but so the recipient can enjoy the ownership as the testator has done. And it should not be assumed that residue will be sufficient to fund the compensation without injustice. The article destroyed may have a disproportionate value, unknown to the deceased (as in the recent case of the £9m Chinese vase where the testatrix kept her umbrellas, given as a legacy and happily not broken before auction, in an estate worth far less). And what is meant by destruction? If the deceased suffers a fatal heart attack and drops the vase at the same time, is it destroyed or just broken (whether retrievably or irretrievably).</p> <p>Nor are we convinced that the 1975 Act is of any value here. The residuary beneficiary who loses out may not be among the class of claimants under the Act.</p> <p>And why does it only apply to an event occurring at the same time as death? For instance, if the deceased lacked capacity it should equally apply to any destruction during incapacity.</p> <p>We rather take the view that paragraph 10.70 argues the case against "ademption" in this context quite well, by highlighting [i] intractable valuation issues, [ii] the question whether the deceased would have changed his/her will, had s/he lived?</p>		

QUESTION 55

We invite consultees' views about whether there are further specific instances in which the effects of the doctrine of ademption should be mitigated. (paragraph 10.64)

We also suggest that there should be an exclusion too where bank accounts have changed but are traceable. This problem arose in *Re Dorman* 1994, where David Neuberger QC ruled ademption did not apply to the change of a bank account at the same branch. That is a helpful authority, but only goes so far. Where the funds are moved to a different branch or bank (see Neuberger's distinction of the Scots case of *Ballantyne*), it would not apply. It seems to us that where the fund is still identifiable, but its situation is changed for purely pragmatic reasons, then the law should be more flexible and ademption softened.

This is a frequent cause of injustice. People sometimes like to give specific assets in their wills. They may be proud of what is in a bank account, and like to think that it will pass to some beloved relative, as they add funds to it. They may not be prepared to give a simple legacy, since they want to protect other assets passing to other beneficiaries, so make the legacy of a specific fund ("savings at Z Bank to X, house to Y"). But they then seem to completely forget or fail to appreciate that their will only refers to the account by name, so that if there is nothing in that account, the legacy fails. They appear to think in their own minds – if they think at all - that the fund is a continuing one, that it is all the same thing, and that there is no need to trouble the solicitor. We recognise that this can be difficult to remedy, but if the fund remains identifiable and traceable, then why should the ademption rule not be softened here, too?

QUESTION 56

We ask consultees for their views on reform to create a general exception to ademption where the property that is the subject 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. (paragraph 10.71)

We do not find this convincing. We do, however, think that our proposal that a gift of an asset should be deemed to include a gift of its insurance proceeds, would remedy some of the perceived difficulties of “ademption” here.

QUESTION 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 or her death. (paragraph 10.74)

We do consider that something along these lines should be further considered. It would tie in with our proposal that insurance proceeds should devolve on the legatee of the destroyed/stolen item. Insurance proceeds are the product of a contractual right legally distinct from the item itself, but which in general would be thought to be intended by the testator to pass to the legatee.

If a testator includes the gift of a property in his Will, but between will and death disposes of the property reserving a long leasehold over part, that leasehold is still within the gift. It may be very different from the original gift, but is part of it. A mortgage back is not conceptually distinct. It arises out of the property too.

QUESTION 58

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

Do consultees agree? (paragraph 11.37)

Yes:		Other:
We agree also that if a dispensing power is to be introduced a testator’s intention to		

revoke by these methods should fall within the scope of the power.

QUESTION 59

We ask consultees to provide us with any evidence that 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? (paragraph 11.55)

Two examples of cases from my practice where cohabiting couples made wills which were unwittingly revoked by their subsequent marriage, spring to mind.

In the first long-term co-habitees who, at the time they made their wills had no intention to marry, made wills in favour of each other. The man's will which was drawn by a solicitor stated that it was made in contemplation of his divorce from his wife, which had no relevant effect as she was never a beneficiary. The solicitors gave no advice that, should the couple subsequently marry, their wills would be revoked and the co-habitee would receive only a widow's entitlement on intestacy. The co-habitees subsequently married. The widow had to bring a 1975 Act claim against the son who was the other person entitled on intestacy. It was her position that neither she nor the deceased knew that the marriage would have revoked the will. The son relied on a letter of advice to the deceased from some 25 years earlier telling him that marriage would revoke a will as evidence that he would have known the law; the evidence would have had slightly more force had the testator not been illiterate.

In the second long term co-habitees engaged the services of a will-writer who turned up to their house in the midst of their preparations for their wedding which was to take place the following week. From the will of the husband it was apparent that the will writer was aware

of the impending wedding as he gave the wife-to-be her husband-to-be's surname in the draft and referred to her as his wife. The couple executed the wills 3 days before they married. The husband died some 10 years later. The wife successfully claimed a grant of the husband's will in solemn form, on the footing that there was sufficient "practical expression of contemplation of marriage to a particular person" within the will that the section 18(3) exception applied. But it was a close-run thing.

These cases clearly show ignorance of the rule among the general public and at least some will writers. It is inevitably more difficult to think of cases where there is evidence of knowledge of the rule.

On balance, and subject to my answer to Q 60, we think that the rule that marriage automatically revokes a previous will should be retained. Sophisticated and wealthy testators and their families are more likely to be accurately advised about the effect of marriage. Less sophisticated and less wealthy testators are less likely to be so advised. I consider that if, through ignorance of the rule, the second spouse is left with at least the statutory provision on intestacy, that is a less bad outcome than being left with nothing and having to fight the children of a previous marriage benefitting under an unrevoked will.

But we consider that an improvement would be that the marriage revoked wills, save for gifts to the party whom the testator married. If thought necessary, that saved gift could then be brought into hotchpot on intestacy to prevent double-provision.

QUESTION 60

Should testators be empowered to prescribe whether a will or particular dispositions in it should be revoked by a future (uncontemplated) marriage? (paragraph 11.58)

Yes:	No:	Other:
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We agree that testators should be given the choice to opt out of the basic rule.

Further, as mentioned above, sections 18(3) & 18(4) might be amended so that, as well as the contemplation of marriage provisions, there is a further exception to the effect that where the testator marries any beneficiary under his will any disposition to that beneficiary is preserved (but brought into account on intestacy).

QUESTION 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? (paragraph 11.62)

Yes:		Other:

QUESTION 62

We propose that section 8 of the Inheritance (Provision for Family and Dependents) 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? (paragraph 12.42)

Yes:		Other:
<p>We agree that there is no coherent basis for abolishing mutual wills, undesirable and misunderstood though their effects may (sometimes) be – though not perhaps as often as is thought. The proposal to amend section 8 of the Inheritance Act to provide that property subject to such an arrangement may be treated as part a deceased's net estate for the purposes of the 1975 Act would alleviate some of the problems created by mutual wills. We think, however, that the answer may lie in giving the court a discretion whether to treat the property as such, rather than</p>		

there being an automatic inclusion. There are differences between the treatment of assets of the two parties to the mutual wills. One spouse dies first, using a mutual will. He/she would never in a million years expect that his/her assets would pass to the surviving spouse's later co-habitee under the 1975 Act. Had they seen that coming, they would have included a life-interest instead. It would be a strong thing to include that person's assets within the survivor's estate for 1975 Act purposes, though not at all a strong thing to include the survivor's assets free from the mutual will obligations.

QUESTION 63

Do consultees believe that the DMC doctrine should be abolished or retained? (paragraph 13.50)

Following the clarification provided by *King v Dubrey*, we consider that the DMC doctrine should be retained to cover the limited range of situations where a DMC would assist the fulfilment of the donor's intentions.

QUESTION 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:

- (1) the effect that the issue had upon the people concerned;
- (2) the scope of the problem; and
- (3) why the problem is inadequately addressed under the current law. (paragraph 14.18)

We are unable to contribute on this issue, though we are aware that the loss of access to digital assets post-death can be extremely upsetting, and would in principle support any proposal which enabled personal representatives/next of kin to continue to access them.

QUESTION 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. (paragraph 14.33)

	No:	Other:
<p>It is exceedingly rare that a Will is not dated. It tends only to happen in home-made wills. But we have never seen the appointment of a guardian in a home-made will.</p>		