Consultation Response

Law Commission- Making a Will

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About this consultation

The current law on wills in England and Wales comes from the Wills Act 1837, an archaic statute which does not account for modern and sophisticated understanding of mental capacity. The strict rules around the formation of a valid will also restrict many people from exercising their right to dispose of their property on death according to their own wishes ('testamentary freedom').

Older people may find it particularly difficult to make a valid will, this may be because they are living with dementia, vulnerable to 'undue influence' or have general problems communicating and understanding what they want to happen to their possessions after they die.

The law in this area is very outdated and reform is very much needed. The Law Commission suggest that 40% of adults do not have a valid will when they die. The idea is to increase awareness of how to make wills, to improve protection and to make will making services more accessible. The consultation paper looks at how to modernise the law on wills and how the law could comply with article 12 of the Convention on the Rights of Persons with Disabilities (CRPD). Article 12 of the CRPD provides for the recognition that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

In response to the Law Commission's Consultation Paper on wills, we hosted a Policy Sounding Board comprised of 25 older people who regularly attend meetings at Age UK to discuss and give their views on current issues and legal reforms which impact older people.

Key points and recommendations

- Older people need to be protected from undue influence and this need for protection must be balanced with a respect for people's testamentary freedom.
- Allowing people with limited or fluctuating capacity to make a valid will is a key aspect of helping disabled people exercise their rights under article 12 Convention on the Rights of Persons with Disabilities.
- We welcome proposals to develop a category of 'supported wills' to meet the needs of people with fluctuating capacity, however will making supporters should be regulated, legally recognised professionals who must successfully complete standardized training and be registered with an independent regulator. Older people should not have to bear the extra cost needed for a supported will merely because they are disabled, instead a system similar to that for Independent Mental Capacity Advocates should be established.
- While we agree that electronic or video wills might help older disabled people make valid wills more easily and may encourage more people to make wills, there are a number of serious concerns around security that would need to be tackled first.
- Our Policy Sounding Board identified the following as barriers to will making:
    - Cost – a belief that solicitors are too expensive and intimidating
    - Ignorance - not understanding why a will is necessary
    - Not wanting to contemplate one's own death.

- The general rule that a marriage or civil partnership revokes a previous will is not a widely known rule. It is vital that older people are given more advice on when to update their will and clear information about what updates are needed and the cost of updating their will. We suggest that the Law Commission should consider replacing this general rule with one that states that a marriage/ civil partnership invalidates any gift to certain recipients (e.g. an ex-spouse/ civil partner) in any previous will but does not revoke the will in its entirety.
- The MCA mental capacity test should be adopted as the test for testamentary capacity. When it is used properly it is modern, clear and focuses on the individual person and decision at hand.
- A Code of Practice should provide guidance on when, by whom and how a testator's capacity should be assessed. It would be useful for the Code of Practice to set out a number of indicators or warning signs which highlight the need to consider carefully whether a testator has capacity in certain circumstances.

1. Introduction

Age UK is the country's largest charity dedicated to helping everyone make the most of later life. The Age UK network comprises of around 150 local Age UKs reaching most of England. We provide information and advice to around 7 million people each year, through web-based and written materials and individual enquiries. We work closely with Age Cymru, Age NI and Age Scotland. Since April 2017, local Age UKs have received over 1000 enquiries regarding wills and estate planning.

The key principles behind our recommendations, set out in this consultation response are as follows:

- Accessibility - will making services should be accessible to everyone including older people, disabled people and people in vulnerable circumstances.
- Affordability - all reforms to the law on wills should be affordable.
- Autonomy - the testamentary freedom of testators should always be respected, everyone should have the chance to record their wishes and have them respected to the maximum extent possible.

2. Undue Influence

Overall, we strongly agree that people need to be protected from undue influence and that this need for protection must be balanced with a respect for people's testamentary freedom. Given the difficulty of establishing undue influence when a will is challenged, potentially many decades after it is executed, the priority in this area should be to do as much as possible to prevent undue influence occurring at the time a will is made.

We are particularly concerned that some older people in vulnerable circumstances (e.g. people with dementia) are more susceptible to pressure and financial abuse, and if this is happening they need immediate support. We appreciate that this is outside the scope of this consultation, however, we hope that Government will accompany any legislation on wills by improving access to independent information and advice, affordable, accessible will-writing services and, where necessary, effective safeguarding services.

To demonstrate the types of issues that local Age UKs are is contacted about, we have collated some of the key enquiries that we have received since November 2016. The cases throughout this response show the kinds of problems that older people face. Further case studies can be found at Appendix 1.

Case study

C's Mother, 75 lives with a younger man, in property owned by Mother. The younger man rents out his former home and other properties too. C concerned that younger man is 'bullying' Mother to change her will, so that Mother leaves some of her estate to him. C is listed as executor of the estate. C also has concerns that the man seems volatile - he escalates issues into an argument. C feels Mother is vulnerable in this situation. Mother intends to ask man to leave her property and then go on holiday for a month in hope that when she returns he will have left. C seeking clarification about the man's rights to remain.

Consultation 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.
We do not have any specific evidence on this, but as a matter of principle believe that the process and cost of contending probate proceedings should not inhibit strong cases from being heard.

Case study

C is querying the amount he is being asked to pay solicitors for dealing with probate following the death of his wife. They are requesting a percentage of the estate, which amounts to quite a large sum. C has spoken to friends who say that it hardly cost anything when the estates of their late spouses were dealt with. C wants to know whether it is normal practice for such large sums to be charged.

Consultation 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?
We agree

3. Supported will making

We agree with the Law Commission's proposals for a supported will making system. We believe that a system which will help people with limited or fluctuating capacity to make a valid will is a good idea which is long overdue, and is a key aspect of helping disabled people exercise their rights under article 12 Convention on the Rights of Persons with Disabilities.

We consulted our Policy Sounding Board about this who agreed that a supported will-making service is needed. However they did show some concern about how much such a system would cost and who would bear the cost of the service. It is our firm belief that older people should not have to bear the extra cost needed to ensure that they can make a valid will merely because they are disabled or in vulnerable circumstances. We envisage that difficult questions about who will pay for the supported will making service and who will provide the support could arise. We would like to see a service set up similar to that of Independent Mental Capacity Advocates under the Mental Capacity Act.

The key to providing a good supported will making service will be training 'supporters' to understand the needs of people who will be using the supported will making system. Dialogue will need to occur between the person using the will making service, any family member/ friend who understands their specific need for support and a will supporter. This collaborative approach will maximise the amount of people who can use the system and therefore have their testamentary freedom respected.

We are calling for a person-centred understanding of disability. This means focusing on a testator's strengths in order to facilitate their making of a will in the most appropriate manner. Understanding the key difference between decision-specific capacity and not making assumptions that a person lacks capacity globally will be vital to the success of a supported will making system.

In principle we agree with the Law Commission that the key principles behind a supported will making system should be that it:

- Is available to all for free or basically for free;
- Is based on the person's will and preference;
- Is not limited by the method of communication the person requires;
- Is able to contain provision for the legal recognition of the supporter;
- Is not be used to limit the rights of disabled people;
- includes provision for individuals to refuse support;
- includes safeguards to ensure a person's will and preferences are respected; and
- is aimed at enhancing the skills of the testator to make their own valid decisions regarding their will.

Another issue for our Policy Sounding Board was the risk that a supported will making system may be seen as a substituted will making service. We want to make absolutely sure that a supported will making service is only ever used to help people realise their testamentary freedom and never to impede it.

We believe that well-informed, guided family members should be allowed to be part of the supported will making process. For example, if a testator is quadriplegic, only his spouse may know how to communicate with him through blinking or small muscle movements. However, it is vital that, when a family member or personal friend is assisting a professional supporter, everything possible is done to safeguard the testator from undue influence. This will include consideration as to who can benefit under the will. Non-professional supporters must have access to appropriate guidance and information on supporting testators, at all times, free of charge. When a professional is acting as a supporter, we strongly advise that they complete a standardised training programme that enables them to understand the needs of older people and the intricacies of helping someone make a will. We recommend that professional supporters are entered onto a register and regulated by a professional body so that people can find suitable, regulated supporters easily and also have a body to complain to if things go wrong.

Case Study

C recently spoke to a will writing firm regarding her parents writing a will. The will writing co. said that because her Father has early dementia diagnosis, this would complicate matters and spoke of needing a letter from Father's GP and maybe setting up a property protection trust. Father is in early stage dementia and is relatively coherent. Could you please help me decide the best way forward?

4. Electronic Wills

We would recommend a system where a wet signature and paper will are retained as a valid will making method. We are not opposed to the concept of electronic wills however, a key issue with electronic wills for older people is the risk that a testator may share key documents or data with others. It is vital that these risks are managed so that the will is not found to be invalid due to undue influence.

We appreciate that encryption and blockchain technologies are very secure but we have some reservations about the security of such technologies as hacking capabilities and alternative secure technologies develop. Wills are in the rare situation of having to be secure for decades and that is a particularly problematic issue when it comes to computer technology, software and artificially intelligent systems. An electronic will making system would need to be able to be updated and adapted as new more secure technologies arise and protection against hacking would need to be a continuous process. The security of a digital signature is very important, especially for older people who may allow other people to access their computer or use their computers, laptops and smart phones on their behalf.

The electronic will making system would need to be very easy to use and accessible in both rural and urban areas. Given that older people are often digitally excluded from society, we would need to have more details about how useable the system would be for older people with little or no experience of using computer technology and disabled people who cannot physically write and sign a paper will.

Paper wills are likely to be more accessible to older people but there may be a place for video wills or electronic wills for disabled older people. In order for electronic wills to be a useful option for older people, older peoples' access to technology needs to increase and there needs to be a safeguard to prevent people taking advantage of some older peoples' lack of knowledge.

Striking the balance between allowing older people to make electronic wills and protecting them against fraud, undue influence and financial abuse is vital.

Consultation 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.
We would like to see an enabling power for court assessed video wills, which could allow people who have mobility or literacy difficulties being able to make valid wills which accord with their wishes. We are very much alert to the fact that a video will may increase the risk of undue influence and we think that adequate safeguards would be needed to prevent this risk, for example, expert evidence could be used to provide evidence as to whether a video will had been edited.

5. Formalities

A key concern is that wills should be accessible to older people, especially older people who are in vulnerable circumstances or disabled. This need to protect their testamentary freedom needs to be balanced with the need to protect older people from undue influence and financial abuse. One way to ensure more people make valid wills would be to ensure that professional will writing services are affordable, accessible and not intimidating.

Another concern is ensuring people who make a will know when their will needs updating and that people who don't have a will know when they will need to create one.

Our Policy Sounding Board identified the following as barriers to will making:

- Cost - it was expressed across the Policy Sounding Board that solicitors' fees for wills are perceived to be too high. Our board members told us that they were not used to dealing with solicitors, found them intimidating and generally didn't feel comfortable in a legal environment.

Case Study

C lives in a rented property and has limited savings. C's only relative is his Daughter who lives abroad and has dementia. C is quite elderly and wants to ensure that when he passes away, his savings go to his daughter. A neighbour has drafted what sounds like a very complicated will (involving Powers of Attorney also). C seeking some advice on whether he really needs to do something so complicated or whether he needs to make a will at all.

- Ignorance - many Policy Sounding Board members felt that lots of people think they do not need a will. People assume that there will be no issues with their property after they die and that their family will work out what to do with their estate. There was some support for the view that people with a low value estate did not think they owned enough property and assets to make a will worthwhile.

  Case Study

  C's parents have passed away, Mother followed by Father, their assets comprise joint bank account containing £81,000. C and estranged Brother are the only children. Father and Mother did not make a will. Mother wrote a letter prior to death about leaving estate to C and grandchildren. C has tried to get monies released without probate, the bank will not allow without probate. C thinks a letter from a solicitor may be enough.

- Talking about death - our Policy Sounding Board made it very clear that dealing with what happens to property after death is a difficult subject. There was some support for the idea that writing a will when you are older gives the impression that you have given up on life or that you are willing to succumb to a serious illness, which may have been recently diagnosed. We want to encourage positive and honest conversations between testators and beneficiaries that will enable the testamentary freedom of the testator to be respected more easily.

Consultation Question 15.
We invite consultees' views on whether the current formality rules deter people from making wills.

The research we collated from our Policy Sounding Board suggests that people understand what a will is and what it does, however, many do not understand the technicalities behind wills and are not confident in writing a will without a solicitor. When some older people write wills without a solicitor, they may be too informal (e.g. in the form of a letter or note) to form a valid will. So the first barrier to making a will may be getting access to appropriately regulated will-writing support service, rather than the formalities themselves. However, we would welcome steps to remove any formalities that are obsolete.

Consultation 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?
We agree

Consultation 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?
We agree

Consultation 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?
We agree

Consultation Question 25.
We provisionally propose that holograph wills are not recognised as a particular class of will in England and Wales.
Do consultees agree?
We agree

Consultation 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?
We agree

Consultation 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?
We agree, however we would like to see the introduction of a compulsory register for electronic wills where the original file of the electronic will could be stored, if electronic wills are to be accepted as valid wills.

6. Revocation of a will on marriage/ civil partnership

From speaking to our Policy Sounding Board it became clear that the general rule that a marriage or civil partnership revokes a previous will is not a widely known rule. It is vital that older people are given more advice on when to update their will and clear information about what updates are needed and the cost of updating their will.

Consultation 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?

We have found that this rule is not widely understood and on balance, therefore, it should not be kept in its current form. We would suggest that the Law Commission considers, instead, a new rule whereby a marriage or civil partnership only revokes any gift given to certain parties in a previous will, for example an ex-spouse/ civil partner . This would mean any will written before the marriage/ civil partnership would be valid, apart from some gifts. This new rule should also allow for an exception where a will specifically dictates that any such gift should not be invalidated by a future marriage/ civil partnership.

Consultation 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?

We agree

7. Mental capacity

We wholeheartedly agree that the Mental Capacity Act 2005 (MCA) test of mental capacity needs to be adopted as the test for testamentary capacity. When the MCA test is used properly, it is modern, clear and focuses on the individual person and decision at hand. A Code of Practice should provide guidance on when, by whom and how a testator's capacity should be assessed. It would be useful for the Code of Practice to set out a number of indicators or warning signs which highlight the need to consider carefully whether a testator has capacity in certain circumstances. We note that lists of capacity "red flags" have been compiled and could provide a useful source of reference.

We support the usage of a statutory presumption of capacity regardless of which test of testamentary capacity is used going forwards.

<u>Case Study</u>

C concerned Brother is struggling - he was sectioned 4- 5 years ago. Brother doesn't leave the house, has a gardener and nurse visit plus someone to help with shopping. Brother has mental capacity, although at times this fluctuates. C unsure how to approach Brother about creating a Lasting Power of Attorney and will.

Consultation 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?
We agree

Consultation 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?
We agree.

Consultation Question 10.
We invite consultee's views on the content of the code of practice.
We think the Code of Practice should include:

- requirements for assessors of mental capacity;
- issues relating to mental capacity which apply specifically to wills e.g. does the testator understand the value of their estate?
- guidance on how mental capacity assessors are regulated and how their decisions can be appealed;
- guidance on assessing someone with fluctuating capacity;
- guidance on the presumption of capacity;
- guidance on mental capacity being decision specific- i.e. someone might understand that they own a house, two cars and some shares but they might not understand the significance of bequeathing these items to someone else in a will.

Appendix 1: Undue Influence

C has been suffering from domestic abuse from his wife for 12 years. His wife went into hospital on 20th March. The day before this she changed her Will. C thinks that wife's daughter has influenced her. Wife died in April. Daughter has collected considerable paperwork from the house. Daughter has POA and won't transfer any money into the account to help C pay bills. In wife's new will, there is no provision for C. C used to pay his pension into the joint account. Wife used to pay the bills out of their joint account. Wife also used to transfer money into her personal account and buy premium bonds and assured C that he would receive the benefit of these. Bills and debts are building up. C wonders whether he should challenge his wife's will.

C queries late father's estate. Father died in 2013, solicitor is executor. Father bequeathed 1/4 share in property - C has not yet received this. Solicitor says this should be going through but has refused to comment on whether C should see documents relating to the gift. C paid for father's funeral and claimed money from father's estate, which has not been paid. C queries this. Mother is in care home placement. Sister has LPA for financial decisions. C thinks that Mother might lack mental capacity for decisions. C questions decisions Sister is making. Mother wanted C and Sister to have a lump sum payment. Sister claims she sent letters to C about this. C couldn't reply because of physical and mental illness, so Sister put C's share into her own account as well as her own share. C queries whether this is correct. C also says that Sister is very domineering. C thinks that Mother would just do what Sister wants.

C calling with regards to her father-in-law's will. C's brother-in-law had Lasting Power of Attorney for both finance and care related decisions for father-in-law. C states that he abused his position as an attorney. C refers also to a situation where the will was changed in May 2016. C believes that father-in-law possibly did not have mental capacity at this time. C has sought Legal advice to contest will. C's solicitor states that the will is valid. C wanted to know who decides mental capacity. C wanted to know whether as an attorney her brother-in-law is able to make changes to will.

C phoning about potential financial abuse of Uncle. C and Brother obtained deputyship for Uncle last year and when sorting finances, numerous factors came to light which C feels are of concern. There is a current discrepancy over Uncle's mental capacity. There have been problems with undocumented spending of the uncle's money from his bank account. C also stated problems over Uncle's will. Possible coercion over changing of the will by carer's with Uncle's estate being left to carers – Office of the Public Guardian have been notified and current discrepancy over whether Uncle is able to change her will.

Appendix 2: Mental Capacity

C's 90 year old mother is in a care home with dementia. Mother had joint account with her Husband (C's Step- Father) who has just died. Mother lacks mental capacity and there is no Lasting Power of Attorney. Mother didn't make a will and has now lost mental capacity, there was no written agreement and C concerned when Mother dies the money will pass to her sister. C realises she will need deputy powers. Wants to know do you have to pay fees up front?

C's Sister-in- Law went to solicitor to make sure her will is secure. Solicitor advised getting a certificate of mental capacity to ensure that her will could never be contested. Solicitor suggested getting the mental capacity certificate from GP. Sister- in- Law's Husband and C have tried for weeks to get a GP appointment, but they feel fobbed off. C says that they have been advised that the surgery treats the request urgently but nothing has happened.

C's Father died on Monday. Sister has obtained medical certificate in order for her to register the death. Sister plans to arrange a cremation for Father, which C feels goes against his wishes/ religious beliefs. C not aware a will was created, Father lacked mental capacity since 2007 and so no will created after this point. Sister is stating she has a copy of the will but is not presenting this to family. What can C do to stop cremation going ahead?

Father made a will and changed it in 2015. Father was diagnosed with dementia in 2014. C looking to challenge the will. C seeking evidence of Father's lack of mental capacity to make a new will. C has written to NHS England to request medical records for late Father as C thinks there will be information to indicate he lacked MC to make a will for some time before 2014. The sole beneficiary of the will, when it was changed in 2015 was according to C a registered Lasting Power of Attorney for finances for some time before 2014.

C's Mother drafted her will in 2011 (with C as her executor) but Mother did not get round to having it signed because C find wills terrifying and the company they used went out of business soon after. C chased it up afterwards but kept putting it off since she became housebound. C's Mother is now 92 years old and was diagnosed with dementia in 2013. Her dementia has not worsened and she is still able to understand and talk to C and the rest of her family. Mother needs help with mobility and changing of clothes, but C's Father is her primary carer responsible for looking after her. Mother may or may not be able to physically sign the will (depending on her mood). C wants to know whether it is possible to review her will? What does C need to do in order to proceed? Unfortunately her GP has been unable to advise on the matter.