"Making a Will"

Consultation Response: Wedlake Bell LLP

Wedlake Bell LLP is a central London law firm over 200 years old. It has 59 partners and is one of the top 100 firms in the UK on turnover.

The firm welcomes the opportunity to respond to the Law Commission's Consultation Paper "Making a will" published on 13 July 2017 ("**the Consultation Paper**").

Wedlake Bell's response has been prepared by its Private Client team and is limited to those aspects of the Consultation Paper it feels are most important to its client base.

Wedlake Bell's Private Client team has extensive experience of preparing and advising on Wills, administering estates, and acting for parties involved in contentious probate claims. The team is ranked in the Legal 500 2017 (tier 3) and was a finalist in the Society of Trust and Estate Practitioners (STEP) Private Client Awards 2015/2016 for "Legal Team of the Year (mid-size)".

Consultation 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?

We do not think that the word "testator" needs to be replaced. In our experience, the vast majority (if not all) of our clients are familiar with the term. Several other words in the English language derive from, or are connected with, the term (for example, "testamentary", "testament") and we think that is widely understood these words relate to Will-making.

Consultation 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.

The experience of our team on these issues is wide-ranging but some of the most common issues are noted below.

We frequently encounter difficulties with clients executing their Wills. Whilst we strongly encourage clients to execute their Wills at our offices so that we can oversee the procedure, this is not always possible and the client will execute their Will at home. In such cases, we find that the client has problems observing the relevant execution formalities; in particular, the Will might be returned to us un-witnessed, with handwritten amendments (that are not initialled and dated by them or their witnesses), with the pages of the Will stapled together, or without being dated. This is so despite the client being advised by us of the correct execution procedure and we think this supports the case for the courts to have a "dispensing power" as proposed in Question 28 of the Consultation Paper.

In terms of Will disputes, we are asked to advise disappointed beneficiaries, or executors who are faced with challenges from such beneficiaries, increasingly frequently. However, in our experience, many of these disputes do not progress beyond the initial advisory stages due to the costs, time and anxiety involved with bringing a legal claim. The statistics that exist on the prevalence of claims under the Inheritance (Provision of Family and Dependants) Act 1975 obviously does not take into account those disputes that do not reach court, and we would suggest that disputes and disharmony amongst family members and beneficiaries of an estate is far more common than these statistics imply. Insofar as

disputes relate to testamentary capacity, the reforms to the law proposed below should hopefully assist the parties and advisers involved with assessing the merit of the claim and weighing up the chances of success if the claim proceeds.

Consultation 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?

We do not agree that the test of mental capacity set out in the Mental Capacity Act 2005 ("**MCA**") should be adopted for testamentary capacity. As noted in the Consultation Paper, the test is a general one and not specific to Will-making, meaning that there would likely be interpretation problems in practice in applying the MCA test in this area. One example would be the meaning of "relevant information" (s.3(1) of the MCA) in the context of Wills. Case-law would be needed to clarify this and other issues, meaning that in the interim (and building up a sufficient body of case-law could take decades), testators and legal and medical practitioners will be left with uncertainty as to the true meaning of the test. Further, in our view, the MCA test is stricter than the *Banks v. Goodfellow* test, meaning that it will be easier to mount a challenge to a testator's capacity. There could be an increase in litigation and more Wills overturned as a result, meaning that testamentary freedom would not be as well supported if the MCA test is adopted.

We note the proposal that, if the MCA test is to be used as the test for testamentary capacity, the case-law supplementing the *Banks v. Goodfellow* test should be set out in an MCA Code of Practice. We agree that a Code of Practice specific to Wills is needed, but making this body of case-law "fit" the MCA test would be a difficult exercise when the point of law at issue was not decided with the MCA test in mind. Moreover, the Code of Practice cannot be legally binding, meaning that the *Banks v. Goodfellow* body of case-law, built up over centuries (as acknowledged in the Consultation Paper) will in practice lose its significance.

Our preferred approach is to retain the *Banks v. Goodfellow* test as the test of testamentary capacity. As noted in the Consultation Paper, legal practitioners are familiar with it and, from our perspective, the test works well. It is supplemented and refined by a wealth of case-law, which taken together, provide a full and thorough test that is bespoke to Will-making.

That said, we appreciate the points made in the Consultation Paper about the confusion as to whether there are three or four limbs to the test; and as to the shifting burden of proof. It can also be difficult to explain the test to testators and medical practitioners in clear, modern language. We are therefore in favour of the alternative approach outlined in the Consultation Paper of placing *Banks v. Goodfellow* on a statutory footing. In particular, this would allow the issue of whether there are three or four limbs to be clarified (and we agree with the proposal, as set out in **Consultation Question 5**, that there should be a four limbed test of capacity), and would provide a test that is more easily explained and cited to medical practitioners when instructing them to carry out a capacity assessment. Care would clearly be needed in the drafting of the test so as, whilst putting the wording on a modern footing, not to stray from the true meaning. We would suggest that the only modernisation required in terms of the wording of the test, should be to expand on the possible causes of incapacity so as to take these beyond "disorders of the mind" and "delusions"; we see no reason why the language could not reflect that of the MCA ("impairment of, or a disturbance in the functioning of, the mind or brain"). If there is too much "modernisation" of the language, there is a risk that the *Banks v. Goodfellow* case-law cannot be applied.

Alongside the statutory *Banks v. Goodfellow* test, we would like to see the adoption of a MCA Code of Practice specific to Wills. This could set out the key cases that have refined the test over the years, providing a helpful guide for practitioners to which testators and medical practitioners could be referred. We agree with **Consultation Question 9** that this Code of Practice should apply to those preparing a Will, or providing an assessment of capacity, in their professional capacity.

Consultation Question 7

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

Do consultees agree?

We agree with the above, but would add that, whether or not the MCA or a statutory *Banks v. Goodfellow* test is adopted for testamentary capacity, the rule in *Parker v. Felgate* should not be put onto a statutory footing. The rule should remain case-law only on the basis that it is very much an exception to the general rule of capacity being assessed at the point of execution of a Will, and only relevant in a very small minority of cases. Keeping the rule as case-law based will allow it to be refined by later cases, should this be necessary.

Consultation 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?

Agreed.

Consultation Question 14

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

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?

We have no objections to the establishment of a scheme of supported Will-making, and note the advantages of such an option particularly in terms of the promotion of testamentary freedom and autonomy, and compliance with Article 12 of the UN's Disability Convention. We also agree that such a scheme supports one of the themes underpinning the modern test of mental capacity; specifically section 1(3) of the MCA which provides that "*a person is not to be treated as unable to make a decision unless all practical steps to help him to do so have been taken without success*". However, as noted in the Consultation Paper, it is very important that appropriate safeguards work alongside the scheme to prevent it from becoming a future cause of litigation.

We agree that those assisting a testator to have the requisite capacity to make a Will (the "supporters") should be independent and, as proposed at paragraph 4.46 of the Consultation Paper, have experience, training, integrity and a good character, and to hold certain values. The "training" aspect will necessarily involve expense in some form as it will require a professional to undertake this role. We would anticipate that the solicitor preparing the Will would in practice be the best placed to act as "supporter" as, in our experience, medical practitioners may not have sufficient time or know the client well enough. The "training" aspect of the role therefore needs careful consideration, and query whether, if (as suggested

below) the detail behind the scheme is dealt with in a MCA Code of Practice, this could be drafted so as to provide sufficient information to act as an alternative to formal "training" and allow a non-professional, who has read the guidance and signed a declaration to that effect, to be able to act.

We are not opposed to family members and friends from performing the role of "supporter", provided there are appropriate safeguards against undue influence and general misuse of the position. We therefore agree that those acting as "supporter" be prevented from benefitting under the Will, in the same manner as witnesses.

We would favour any supported Will-making scheme to be introduced via an enabling power in primary legislation but with the detail underpinning the scheme to be set out in guidance, and we would suggest as part of a MCA Code of Practice for Will-making (see our response to Consultation Question 3 above). This would make the detail more accessible to lay-persons which is particularly important if it is envisaged that non-professionals are to be able to fulfil the role of "supporter".

Consultation Question 20

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

We agree. This will ensure that the law in relation to witnessing a Will is brought in line with modern family relationships and recognises that a cohabitant can be in an equal position to influence the testator as a spouse or civil partner. To ensure that the rule is efficiently targeted, consideration could be given to using the same definition for "cohabitant" as is used in the Inheritance (Provision for Family and Dependants) Act 1975, under which there must have been at least two years' cohabitation (sections 1(A) and 1(B)). This would also ensure the definition is consistent across the law relating to Will-making.

Consultation 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?

Whilst we appreciate the aim of ensuring that the scope for a witness to influence a Will is kept to a minimum, we do not think that it would be sensible to extend the category of persons who cannot witness a Will to parents, siblings and/or other family members. Elderly testators could find it difficult to find a witness to their Will if the class is made too wide, and this could deter them, and others, from executing their Will promptly, or at all. If the proposed category is included, there is an argument for including other persons in a potential position of influence – wider family and friends etc.; in other words, it would be hard to know where the line should be drawn. Those concerned about the existence of undue influence may have the option to bring a claim after the testator's death, or to discuss the matter with the parties and/or solicitor involved at the time.

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 that the courts be given a "dispensing power" to enable a Will to be recognised as valid notwithstanding that it does not comply with all of the formality requirements. However, we think it is important that this power be structured so that it can only apply in a small minority of cases and, as the Consultation Paper proposes, as a "safety net" for those who have tried to make a Will in the proper form but failed to do so; for example, due to a misunderstanding of the formality requirements. We therefore do not agree that the "dispensing power" should be available for electronic documents, sound and video recordings, and similar, that demonstrate testamentary intention, until such time (if any) that such records could fulfil the requirements of a valid Will. We are of the view that there needs to be a genuine attempt to make a Will in the proper form for the "dispensing power" to apply. We believe that it is fairly common knowledge that electronic records and sound/ video recordings do not currently constitute a valid Will under the law of England and Wales, so a person making such a record should not be able to rely on a court potentially upholding that record as one. To extend the "dispensing power" to such records could encourage individuals to make Wills quickly and informally in reliance on this power without due and serious consideration of all of the relevant factors that need to be weighed up when making a Will, meaning that, ultimately, that record would not necessarily be a full reflection of their testamentary intentions.

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?

Agreed.

Consultation 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?

We do not agree. We do not think that any action should be taken in respect of the recognition of electronic Wills until the technology is in place to support this, and we know what form this will take so that the enabling legislation can be appropriately targeted. The same point applies to Consultation Questions 31, 33 and 34, in relation to which questions we believe no action should be taken at this time.

Consultation Question 36

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

Do consultees agree?

Agreed.

Consultation Question 37

We provisionally propose the creation of a statutory doctrine of testamentary undue influence. Do consultees agree?

Agreed.

Consultation 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; and 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.

We consider the discretionary approach the better form of a potential statutory doctrine for the reasons outlined in the Consultation Paper, and principally because the structured approach will not allow enough flexibility to take into account unusual relationships of influence and the specific circumstances of individual cases.

However, if the structured approach is adopted, we agree that the category of spiritual advisor should be added to the proposed new categories (namely, trustees, medical advisers, those that prepare a Will for remuneration, and professional carers) that raise a presumption of a relationship of influence.

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 agree with the view expressed in the Consultation Paper (at paragraph 7.136) that the costs rules are adequate as they stand.

Consultation Question 41

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

We note the findings of the Consultation Paper that there are examples of situations where a minor has the requisite capacity and understanding to make a valid Will, and the injustice of not allowing his or her testamentary wishes to be respected; but we are of the view that it would be dangerous to assume this of all 16 year olds. Maturity will obviously be of varying levels at that age and whilst many 16 year olds will respect the seriousness and effect of the act of making a Will; some will not, and may use the opportunity without fully considering the implications and are more prone to acting impulsively and irrationally in cutting out family members. That said, we do appreciate that it can lead to great injustice in the case of some minors who are sufficiently mature to make a fully considered Will. For that reason, and in part-response to **Consultation Question 42**, we would suggest that, whilst the age of testamentary capacity be kept at 18 years, the court be given discretion to dispense with this rule in exceptional circumstances. This would maintain consistency with the proposal that the court be given a "dispensing power" in relation to the formality requirements for making a Will. The "exceptional circumstances" should be at the discretion of the court taking into account the relevant evidence. Clearly the existence of a contemporaneous report, at the time of execution of the Will, on the child's capacity, understanding and intention would facilitate the court in exercising its discretion, but we do not think that it should be made a pre-requisite that such a report should have been made by a professional or by a court. This will allow a court a wide discretion to take into account all types of situation; there are reasons why a child may be sufficiently mature but might not want or be able to use a solicitor, for example. Linking the ability

for a court to recognise a child's Will with the production of the contemporaneous report of a professional will necessarily mean that the child's parents will be involved in the Will-making, and there will be obvious opportunities for influence here.

Consultation 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?

We agree. This would correct the anomaly between the effect of a disposal by a testator's deputy, and a disposal by the testator's attorney.

Consultation 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?

Agreed.

Consultation Question 53

We provisionally propose that, except where a contrary intention appears from a 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.

Agreed.

Consultation 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?

Agreed.

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?

In our experience, testators are not generally familiar with the rule that marriage revokes a Will and are surprised when they find out, usually after their marriage, that their Wills need to be re-written. The threshold for capacity to marry is relatively low (see *A,B and C v. X and Y* [2012] EWHC 2400 (COP), a

case in which Wedlake Bell advised the claimants) which means that there will be cases where one of the couple lacks the capacity to make a Will, yet has the capacity to marry. Therefore, a Will written whilst a vulnerable spouse had testamentary capacity could effectively be overridden in favour of Intestacy Rules that benefit the new spouse, despite the testator not having the requisite capacity to make a Will in that spouse's favour. The mismatch in tests of capacity as between marriage and making a Will means that there is scope for abuse with "predatory marriages": an opportunity for a new spouse to effectively disinherit the family members of the vulnerable spouse for their own benefit. Therefore whilst these two tests are non-aligned, we consider it fairer to, and more protective for, vulnerable spouses for the rule that marriage revokes a Will to be abolished.

Furthermore, in our experience, the rule produces too many unintended results where the Intestacy Rules are left to fill the gap, and these will generally be inappropriate from a succession and estate planning perspective. For example, in second marriage cases where a testator has a Will and children from his or her first marriage. The children of the first marriage will have to share the testator's estate under the Intestacy Rules with the second spouse with no guarantee that the second spouse will pass on that share to them when she or he dies, particularly if the second spouse marries again. The revocation of the testator's Will would therefore deny the children of the first marriage the share of the estate that she or he would have wanted them to have originally, and a necessitate claim under the Inheritance (Provision for Family and Dependants) Act 1975.

The rule that marriage revokes a Will has not been reconsidered since 1837, and the structure of family units has moved on considerably since then. In particular, people cohabit longer before marriage than they used to (if at all) in 1837, making it more likely that such couples will update their Wills to include one another long before they decide to get married. The likelihood of the pre-marital Will being a true reflection of a testator's wishes, and taking their new spouse into account, is therefore relatively high in our opinion. If the pre-marital Will is clearly inappropriate and outdated, in our experience, the couple will amend it before their marriage in any event. However, sadly, many couples will assume that their pre-marital Will, which takes the other party into account, will remain valid after the marriage and they take no action. The inevitable claim under the Inheritance (Provision for Family and Dependants) Act 1975 must then be made, which could so easily be avoided if the rule was abolished to best serve the majority of interests.

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.

Agreed, regardless of whether the general rule that marriage revokes a Will is abolished.

Consultation Question 62

We propose that section 8 of the Inheritance (Provision for Family and Dependants) 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?

We agree. We note the issues that an abolition of the Mutual Wills doctrine could cause (as set out at 12.28 to 12.31 of the Consultation Paper) from a restriction of testamentary freedom perspective, and further that there does exist a small minority of cases where the Mutual Wills doctrine is helpful, uncontroversial and necessary from an asset protection perspective (particularly in the case of second marriages). Adding assets subject to the Mutual Wills doctrine to the definition of the net estate under the Inheritance (Provision for Family and Dependants) Act 1975 seems a sensible middle ground between retaining the doctrine with all of its well publicised problems (but also good body of case-law), and abolishing it.

Consultation Question 63

Do consultees believe that the DMC doctrine should be abolished or retained?

We believe that it should be abolished for the reasons set out in the Consultation Paper, but namely, the great risk of abuse posed by the doctrine given that it usually involves an oral statement by a donor at a time when they have a terminal condition and are consequently extremely vulnerable to fraud and influence. Establishing the donor's true intention is extremely difficult when there is no written document and/ or contemporaneous note of their wishes or assessment of their capacity. If the doctrine is abolished, would-be donees may have the option of bringing a claim under the Inheritance (Provision for Family and Dependants) Act 1975 if they fit within one of the categories of eligible claimants. We note, however, that would-be donees who do not fit into such categories would be at risk of injustice by the abolition of the doctrine. Consideration could perhaps be given to extending the proposed "dispensing power" for the courts in relation to the formalities required for a valid Will to oral statements "donatio mortis causa", but on the basis that there would be a very high threshold for a successful application under this heading.

Consultation 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.

At this stage, we are encountering more difficulties in advising clients on whether and how they can pass their digital assets onto their beneficiaries. We are yet to see many problems of how digital assets are transferred in a probate context, although this will become increasingly prevalent as time goes on. In a Will drafting context, it can be difficult to advise clients as to which digital assets can properly pass to their beneficiaries as opposed to the relevant account being terminated on death, given that digital service providers have different policies on inheritance, and the assets will very often be subject to the succession rules of a different jurisdiction, with U.S. based digital assets being the main example. A further issue is whether the testator is permitted to leave their usernames and passwords for use by their personal representatives and beneficiaries, as many of our clients would like to do, in view of the provisions of the Computer Misuse Act 1990.

Burial and Cremation

Although there is no specific question on this section of the Consultation Paper (paragraphs 14.1 to 14.29), we wish to record that we are in favour of this area of the law being reviewed and we note that the Law Commission is currently discussing the possibility of a law reform project with the government. Many people do not know that their directions as to the disposal of their body in their Will are non-binding, and we are aware of the problems that can be created in intestacy situations when there is a dispute as to who should be appointed as administrator of the estate. We think that the option referred to at paragraph 14.27 for individuals to be able to make a declaration as to the burial/ cremation wishes merits exploration as part of a law reform project in this area.

Wedlake Bell LLP

9 November 2017

Ref: AS/SAB