‘Making a will’ – consultation from The Law Commission

A response by

The Chartered Institute of Legal Executives

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1. Introduction

1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers. This includes more than 2,500 members of all grades who work in the private client field, which includes supporting testators.

1.2. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.

1.3. This response includes contributions from some of CILEx's members working in will-writing. CILEx liaised with members through its Private Client Specialist Reference Group, and conducted a survey of members into their experience with writing wills. These are expanded in more detail below.

2. General Points

2.1. CILEx supported the decision of the Legal Services Board (LSB) in 2013 to designate will writing and estate administration a reserved legal activity under the Legal Services Act 2007.[1]

2.1.1. CILEx has not been otherwise persuaded in the intervening period, and we feel the complexities highlighted in the Commission's consultation lend yet further weight to the argument that where a will is being prepared in exchange for a fee, gain or reward then it should be done by authorised persons who are suitable qualified and regulated.

2.1.2. We recognise the Commission has not explicitly considered this point in this consultation, however we believe that the case remains strong and it is in the public interest for it to continue being made. We hope the Commission will consider incorporating the recommendation as this programme proceeds.

2.2. In addition to some of the amendments proposed in this consultation, which will likely require primary legislation, CILEx is aware that there is an intrinsic link between will-writing and Powers of Attorney as highlighted throughout the consultation.[2]

2.3. Section 3 of the Power of Attorney Act 1971 includes a list of professional groups who may prove a Power of Attorney by means of a certified copy, including; a donor of the power, a solicitor, a notary public, or stockbroker. This provision pre-dates the recognition of Chartered Legal Executives as qualified lawyers and does not include them in the list. This means Chartered Legal Executives acting as Certificate Providers on behalf of donor clients are then unable, once the Power of Attorney is registered, to certify that a copy of it is a true copy of the original.

2.3.1. CILEx is aware that this is something which causes our members a great deal of difficulty in practice[3], as the process must be outsourced to a stipulated professional in the 1971 Act. This causes delays in the

[1] http://www.cilex.org.uk/media/media_releases/lsb_will_writing_response

[2] See paragraphs; 2.122-2.131, 4.40, 10.23-10.42 f The Law Commission's consultation paper, *Making a will.*

[3] One member highlighted that "Powers of Attorney need to be certified on every page with special wording. Lasting Powers can have 20 or so pages each so it's a big ask to get a person to certify them for you, which causes delays." The member goes on to explain that they "have the need to certify up to ten powers a week," and the need to ask solicitors and other groups able to certify copies can prove time consuming.

processing of files, and can unnecessarily exacerbate differences between two lawyers who are of equal standing; a Chartered Legal Executive and a solicitor.

2.3.1.1. This can be particularly troubling given the three-quarters of Chartered Legal Executives are women.

2.3.2. The Ministry of Justice has confirmed with CILEx that this issue needs to be amended by primary legislation. However, no suitable vehicle has been identified in which this issue can be addressed.

2.3.2.1. CILEx therefore requests that this issue be considered by The Law Commission for the purposes of this consultation and any future policy developments.

Chapter 1: Consultation Introduction

3. 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?

3.1. CILEx does not take a view on whether 'testator' should be replaced by another term, or what that term should be if it were replaced. However, we would highlight that whatever term is used should be clearly understood by all concerned.

3.1.1. Some CILEx members highlighted that a term such as 'will-maker' may cause additional confusion, especially since the term can be misunderstood as someone who is advising the person making the will.

4. 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.

4.1. CILEx has encouraged its members to share their experiences directly with The Law Commission.

Chapter 2: Capacity

5. 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;

5.1. 58% of respondents agreed or strongly agreed that the test of capacity contained in the Mental Capacity Act 2005 (MCA) would be suitable if applied as the test of testamentary capacity in England and Wales.

5.1.1. Respondents highlighted that the test contained in the MCA is "clearer,"[4] "thorough and easy to understand," and provides "a clear distinction […] for mental capacity and testamentary capacity which must not be ignored."

5.2. Of respondents that disagreed or strongly disagreed (21%), concerns were raised regarding the possibility of confusing matters for practitioners working in wills.

5.2.1. However, CILEx appreciates that this issue could be avoided providing sufficient guidance is given to individuals working in will-writing, and that the specific elements of capacity necessary to make a will are outlined in the MCA Code of Practice.

5.3. It was also highlighted that unlike the test contained in the common law approach (*Banks v Goodfellow*), which "more than adequately accounts for everything that a testator would need to consider," the test contained in the MCA could be open to "undue influence."

5.3.1. The respondent explained that the common law approach assures that a testator must fully consider the extent of their assets and how they are divided. In the MCA however, a third party could possibly 'explain' gifts made under a will, and this process could be subject to undue influence.

(2) that the specific elements of capacity necessary to make a will should be outlined in the MCA Code of Practice.

Do consultees agree?

[4] Clearer compared to the test contained in the common law approach

5.4. 84% of respondents agreed or strongly agreed that if the MCA test is adopted, the specific elements of capacity necessary to make a will should be outlined in the MCA Code of Practice.

5.4.1. At present, the MCA Code of Practice doesn't extend to the capacity for will-making because *Banks v Goodfellow* stands. It therefore follows that if the test contained in the MCA was adopted, the Code of Practice would need to adapt to reflect the change, along with any associated procedural changes.

6. 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.

6.1. Over half of respondents (57%) agreed or strongly agreed that if the MCA test is not adopted as the test of testamentary capacity, the common law approach as it currently stands should be placed on a statutory footing, citing that it could provide greater clarity for all parties concerned.

6.1.1. Respondents who disagreed or strongly disagreed however (32%), considered placing the *Banks v Goodfellow* test on a statutory footing as unnecessary since the test is already well established, has legal standing, and is understood in the writing of wills.

6.2. When asked whether, in the case that that the MCA is not adopted as the test for testamentary capacity, that a **reformed** version of the common law approach should be placed on a statutory footing, the proportion of respondents that disagreed or strongly disagreed reduced to 16%.

6.2.1. Reasons provided by the 57% of respondents that agreed or strongly agreed, focused on the need to update and modernise the *Banks v Goodfellow* test for testamentary capacity, and the additional need to provide practitioners with greater clarity when conducting will-writing work.

6.3. A significant proportion of respondents that disagreed or strongly disagreed with the proposals mentioned in paragraphs 6.1 and 6.2 of this response commented that they disagreed with the notion that the MCA test should not be adopted.

6.3.1. This is important to consider since the disagreement does not predominately focus on the proposal that the current or reformed version of the *Banks v Goodfellow* test should be placed on a statutory footing. Instead, it focuses on the notion that the MCA test for capacity should not be adopted for testamentary capacity.

6.4. Although a small proportion of respondents indicated that the common law approach is sufficient in testing testamentary capacity, a majority of respondents, throughout our survey[5], emphasised that that the test of capacity contained in the MCA should be adopted as the primary test of testamentary capacity. Furthermore, if the test contained in the MCA is not adopted, the common law approach should be reformed in order to reflect the framework and aspects of the MCA that take into account a modernised understanding of capacity.

6.4.1. CILEx would therefore emphasise that the test contained in the MCA be adopted as the test of testamentary capacity in England and Wales. Furthermore, if the test contained in the MCA is not adopted, additional consultation should be carried out in order to consider how the common law approach for testing testamentary capacity can be updated to reflect the modern understanding of capacity contained in the MCA. At that point, according to a significant proportion of our respondents, the common law approach can be placed on a statutory footing.

7. 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;

7.1. A significant majority of respondents (82%) agreed or strongly agreed that the test in *Banks v Goodfellow* should apply more generally, i.e. beyond comprehending and appreciating the claims on him or her (the third limb), and

[5] See paragraphs; 5.1 and 5.1.1

to include the testator's ability to "*understand the nature of the act and its effects;* [and] […] *understand the extent of the property of which he is disposing*, [and] *shall be able to comprehend and appreciate the claims to which he ought to give effect."*

7.1.1. The remaining 18% of respondents neither agreed nor disagreed with this view of the test in *Banks v Goodfellow*, leaving no respondents to disagree, that delusions or disorder of the mind should **not** be so confined.

7.1.2. Respondents who agreed or strongly agreed that the test in *Banks v Goodfellow* should provide a four-limbed test of capacity commented that a testator suffering from delusions or disorders of the mind would likely lack the capacity to comprehend and appreciate other aspects of the will, not just "*the claims to which he ought to give effect."*

(2) that a testator's capacity may be affected by factors other than delusions or a disorder of the mind;

7.2. 78.95% of respondents agreed or strongly agreed that a testator's capacity may be affected by factors other than delusions or a disorder of the mind, commenting that medication, undue influence, and pressure from family or friends can affect a testator's capacity to make a will.

(3) clarification that the testator must have the capacity to understand, rather than actually understand, the relevant aspects of a will.

7.3. A smaller majority of 58% of respondents agreed that a testator must have the capacity to understand, rather than actually understand, the relevant aspects of the will.

7.3.1. Respondents commented that clarification could provide practitioners and testators with a better understanding of what constitutes testamentary capacity, and how to make wills that accurately reflect their wishes respectively.

7.4. Comments provided by the proportion of respondents who disagreed or strongly disagreed (26%), focused on the importance of both the capacity to understand and the capacity to actually understand the relevant aspects of the will.

7.4.1. Respondents highlighted concerns that by focusing on a testator's capacity to understand the relevant aspects of a will, a testator's ability to comprehend the relevant aspects of a will may be ignored, and as a consequence, the importance of a will being the true intent of the testator may be overlooked.

7.5. CILEx recommends that any statutory version of the test in *Banks v Goodfellow* should provide 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. The statutory test should also consider and recognise that a testator's capacity may be affected by factors other than delusions or a disorder of the mind. CILEx also recommends that this change be considered as part of previous recommendations provided in 6.4.1.

8. 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?

8.1. A significant majority (79%) of respondents agreed or strongly agreed 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.

8.1.1. One member who agreed with the proposal highlighted among other points[6] that the presumption of capacity helps ensure that wills are not unnecessarily challenged by beneficiaries that are "simply unhappy with the testator's decisions."

8.1.2. A number of respondents commented that accompanying a reformed version of the *Banks v Goodfellow* test set out in statute with a statutory presumption of capacity would align the *Banks v Goodfellow* test with the principles outlined in the MCA.

[6] The respondent said: *"Prejudice affects all people (although discrimination is a choice). A statutory presumption of capacity would help ensure that just because someone is old or less articulate than another would not mean their wishes with regards to their will were automatically consciously or subconsciously questioned or disregarded. It would also presumably help prevent wills being challenged by beneficiaries simply unhappy with the testator's decisions and may mean that questions around capacity are mostly dealt with at the time a will is drafted rather than when it comes into effect and people are simply unhappy with the contents of it."*

8.1.3. As a result of this and previous recommendations[7], CILEx advocates 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

8.2. Of the respondents who disagreed with the proposal (5%), one respondent commented that consideration should be given to circumstances where a testator with a mental condition significant enough to mean that they lack capacity, is able to disguise their lack of testamentary capacity. They suggest it is plausible to consider that a mental illness may leave a testator with the ability to comprehend their lack of capacity, but hide or disguise for a variety of reasons.

9. Question 7: We provisionally propose that the rule in Parker v Felgate should be retained. Do consultees agree?

9.1. A significant majority (79%) of respondents agreed or strongly agreed with the proposal that the rule in *Parker v Felgate* should be retained. Additional comments emphasised the importance of enabling a will that, albeit at one point early on in the testamentary procedures, reflects the will of a testator who at the time had testamentary capacity. CILEx therefore agrees that the rule in *Parker v Felgate* should be retained.

10. 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.

10.1. 63% of respondents agreed or strongly agreed that The Golden Rule[8] should be updated and replaced with a code of practice that would provide guidance on when, by whom, and how a testator's capacity should be assessed.

[7] See paragraphs, 6.4.1 and 7.5

[8] The golden rule is defined by The Law Commission's consultation as the current law that answers the following two questions: In what circumstances is it necessary for a testator's capacity to be assessed? And who should carry out that assessment? – paragraph 2.96 – 2.97 of *Making a will.*

10.1.1. Respondents commented that practitioners could benefit from greater certainty, providing the proposed guidance contained in the code of practice is practical, and considers the impact of costs on a testator.

10.2. We hope the Commission remains mindful of this as any changes could potentially burden practitioners with additional workloads as a consequence of additional procedures and code of practices of which to follow.

10.2.1. Increasing the workload of practitioners working in will-writing will likely incur additional costs on behalf of the testator. Furthermore, it is also sensible to consider that in many of these cases, testators that lack capacity may also lack significant disposable income and wealth.

10.2.1.1. The potential increase in costs incurred by testators may also have a detrimental impact upon The Law Commission's goal of increasing the number of people with wills in England and Wales.

10.3. As a result of these consideration, and comments provided to CILEx by our practitioners working in will-writing, we feel it is important to highlight that there is a risk of an increased financial burden that could unfairly impact vulnerable testators who are more likely to require an assessment of testamentary capacity.

(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?

10.4. Opinions are mixed among surveyed CILEx members in regards to whether the proposed code of practice should be set out in statute or issued under a power to do so contained in statute.

10.5. Respondents exhibited concerns over how a statutory code would be enforced and, if issued under a power, how a more effective means of consultation could be achieved.

10.6. 63% of respondents agreed or strongly agreed that if a code of practice were developed, it should be set out in statute. These respondents commented that it would provide assured clarity and could prove useful to practitioners as it would be a standard applied across the board to all testators and wills.

10.6.1. 46% of respondents agreed or strongly agreed that the proposed code of practice should be issued under a power to do so contained in statute. Respondents highlighted that this could be a better option, "as ministers could consult on expert opinion before more detailed regulations are produced."[9]

10.7. It should be considered however, that if set out in statute; the code may become out-of-date, or be overly rigid, and for it to be overseen by a regulatory body may prove more effective in achieving the aims of the consultation's proposals.

11. 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?

12. Question 10: We invite consultee's views on the content of the code of practice.

12.1. CILEx members were asked questions regarding three topics in order to establish what the content of the code of practice should be. These topics included; who should have the power to assess a testator's mental capacity, when a test of mental capacity should be carried out, and how the test should be carried out and what measures should be used.

<u>Who should have the power to assess a testator's mental capacity?</u>

12.2. When provided with examples of groups and individuals considered in the consultation as potential groups who could have the power to assess a testator's mental capacity, CILEx respondents agreed or strongly agreed that medical professionals (94%), mental health specialists (94%) and general

[9] Quote taken from a respondent's additional comment provided in our survey.

practitioners (88%) should have the power to assess a testator's mental capacity.

12.2.1. Respondents commented that for these three groups of professionals, it is likely that individuals within these groups possess a suitable amount of relevant skills and expertise, and are therefore more likely to ensure accurate and thorough assessments of testamentary capacity are carried out.

12.3. A smaller majority of respondents (69%) agreed or strongly agreed that legal professionals should also have the power to assess a testator's mental capacity, citing that legal professionals are in a unique position in which they are able to understand the requirements of the statutory tests and how these tests impact upon the work of the testator and the will-writer.

12.3.1. Respondents also highlighted that legal professionals should be provided with the power to assess a testator's mental capacity in cases where the testator is well known to the legal professional, and who may have had sustained contact with them (when compared with, say, a medical professional whose first contact with the individual is when they conduct a capacity assessment).

12.4. When asked if care workers should have the power to assess a testator's mental capacity, one-third of respondents agreed, one-third disagreed, and the remaining third neither agreed nor disagreed. Respondents were concerned that care workers may lack the perceived necessary qualifications required in order to carry out an assessment of testamentary capacity.

12.5. CILEx is aware however, that although the majority of respondents indicated that healthcare and medical professionals should be able to carry out tests of testamentary capacity, the financial impact this may have on testators should be a cause for consideration.

12.5.1. It can be argued that testators who would require a test of testamentary capacity may likely be in difficult circumstances, or may be considered vulnerable. Therefore, an additional financial burden on the testator may prove significant for the testator and any family members or friends who may be supporting them both practically and financially. As a result, CILEx would like further consideration to be given to the financial impact tests of testamentary capacity may

have as under the proposed code of conduct that would set out who would be able to conduct the test.

When should a testator's capacity be assessed?

12.6. While the majority of respondents (53%) stated that a test of mental capacity should be carried out at the point of taking instruction, a smaller proportion of respondents (20%) stated that a testator's capacity should be assessed at the point of execution of the will.

12.7. It was also highlighted by a number of respondents that the assessment of a testator's capacity should be an on-going process, and should therefore occur at numerous points throughout the process of writing a will.

12.7.1. This is particularly suitable in cases where a legal professional has the power to assess a testator's mental capacity, or refer the testator to someone who does have the power to assess mental capacity, as they are likely to be in regular contact with the testator throughout the process of writing a will.

How should a testator's capacity be assessed?

12.8. While CILEx has encouraged its members to share their experiences directly with The Law Commission, respondents did provide explanations of how they thought a test of capacity should be carried out and what key measures should be used – including one-on-one assessments, potentially on more than one occasion.[10]

[10] A respondent said: "*I believe that you need to spend time with the testator and perhaps meet on more than one occasion so that you can establish knowledge of the person concerned and obtain information from them about their family circumstances by asking them open questions and obtaining the information from them to be able to draft their Wills. The testator should be seen on his or her own to ensure that the information is from them and them alone."*
Another respondent said: *"In a face to face conversation that includes wide ranging topics to establish the person's general understanding and then discussion and questioning in relation to the specific requirements of the document being drafted."*

13. 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?

13.1. Although a number of respondents agree with the proposal for a scheme to be enacted that would allow testators to have their capacity certified by a third party, concerns were raised by a significant proportion of CILEx respondents in regards to who the third party would be, how regulation of the third party would work in practice, and the financial burden this proposal may have on testators.[11]

13.2. Respondents highlighted that introducing a third-party scheme may cause significant regulatory issues if not considered appropriately since the party itself may require an independent body to supervise and regulate the work of the individuals who would provide the tests of testamentary capacity. This may be deemed to duplicate the oversight functions of existing medical and/or legal regulators.

13.3. The proposal of introducing a third party would also call into question who it is that should carry out the tests of testamentary capacity, and what financial cost this would incur for testators. As stated previously[12], CILEx has reservations in regards to the financial burden that may be faced by vulnerable testators in difficult circumstances. If there was a significant cost involved in carrying out a test of testamentary capacity by a third party, this would likely exacerbate an already stressful time period for a testator, who would be in a position of having to consider their own death and the impact this may have on their family and friends.

13.3.1. As a result, CILEx would reiterate the recommendation made earlier in this response[13] that further consideration be given to the financial impact a test of testamentary capacity may have in the case that a third-party scheme is established to carry out tests of testamentary capacity.

13.4. An additional consideration highlighted by respondents was the role that legal professionals, general practitioners and other healthcare professionals may

[11] See paragraph 12.5
[12] See paragraphs 12.1 – 12.5
[13] See paragraph 12.5

have in a testator's life. In some cases, these professionals may have established close bonds with a testator and as a result, they may be in the advantageous position of being able to understand the testator to a greater degree. This is an important consideration since a third-party scheme would establish a system in which a testator's testamentary capacity would almost certainly be carried out by an individual with no previous understanding or relationship with the testator. This would likely have a significant impact in cases where a testator may seem to lack capacity to a third party, but to friends, family and legal and/or medical professionals close to the testator, they may have enough capacity to write a will. (see also 12.3.1)

13.5. As a result of the above considerations and our respondents' comments, CILEx agrees that a certification scheme should not be enacted, but that existing regulatory protections should be sufficient.

Chapter 3: Statutory Wills

14. 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;

14.1. 76% of respondents agreed or strongly agreed that the "best interest" rationale that underpins the exercise of the court's discretion to make a statutory will under the authority of the MCA is currently appropriate and therefore requires no reform.

14.1.1. Respondents also strongly agreed[14] that all the "best interest" considerations provided in The Law Commissions Report on Mental

[14] Proportion of members who agreed or strongly agreed with each of the six considerations are provided below:

(1) 94% of respondents agreed or strongly agreed that the court should continue to consider that the decision maker "must not make their determination merely on the basis of the age or the appearance of the person, or on the basis of unjustified assumptions from the person's condition or behaviour (known as the principle of "equal consideration")."

(2) 94% of respondents agreed or strongly agreed that the court should continue to consider that the decision maker "must consider whether the patient is likely to regain capacity and, if so, when that is likely to occur."

(3) 100% of respondents agreed or strongly agreed that the court should continue to consider that the decision maker "must encourage the person to participate as fully as possible in the decision before making it for the person."

Capacity and Deprivation of Liberty[15] should continue to be considered by the courts when deciding what course of action is in a person's best interests.

14.2. Respondents did however indicate caution in regards to the interpretation of a testator being remembered as "doing the right thing" when carrying out the writing of a statutory will.

14.2.1. Half of respondents (50%) neither agreed nor disagreed that the interpretation is appropriate, while only 22% and 28% agreed and disagreed respectively. A number of comments highlighted the difficulty that comes with trying to make a judgement on how an individual would have liked to be remembered in terms of their morals, in addition to the concerns raised by respondents that focused on the seemingly large extent of interpretation that could take place in these cases.

(2) of the way in which that discretion is exercised;

14.3. Like other stakeholders mentioned in The Law Commission's consultation[16], 44% of respondents agreed that the costs associated with statutory will procedures are too high. CILEx respondents expressed concerns in regards to the lengthy procedures required when writing a statutory will, and the subsequent impact this has on the costs associated with statutory wills.

14.4. CILEx would therefore recommend that further consideration be given to the financial impact the current procedures involved in statutory wills have on testators.

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(4) 100% of respondents agreed or strongly agreed that the court should continue to consider that the decision maker "in making best interests decisions in relation to life-sustaining treatment must not be motivated by a desire to bring about the person's death."

(5) 94% of respondents agreed or strongly agreed that the court should continue to consider that the decision maker "must consider the person's past and present wishes and feelings (including written statements), the person's beliefs and values, and any other values that the person would be likely to consider if they were able (thus inserting an element of "substituted judgment")."

(6) 89% of respondents agreed or strongly agreed that the court should continue to consider that the decision maker "must consult a number of people including carers, holders of lasting powers of attorney, deputies and anyone else named by the person."

[15] Mental Capacity and Deprivation of Liberty (2017) Law Com No 372, paragraph 14.3, Available at: http://www.lawcom.gov.uk/app/uploads/2017/03/lc372_mental_capacity.pdf

[16] Paragraph 3.31 of The Law Commission's Consultation Document – '*Making a will*'

(3) to restrict the circumstances in which a statutory will can be made. Do consultees agree?

14.5. On balance, respondents agreed that reform to restrict the circumstances in which a statutory will can be made should not take place.

14.5.1. 72% of respondents agreed or strongly agreed that the use of statutory wills should continue to be used in cases where a testator has not previously made a will as a result of never having the appropriate capacity to do so.

14.5.2. 72% of respondents agreed or strongly agreed that the use of statutory wills should continue to be used in cases where the testator once had the capacity to make a will but never did.

14.6. Respondents remained undecided in regards to reducing the age at which a testator can make a statutory will from 18 to 16; 39% of respondents neither agreed nor disagreed with reducing the age to 16, whilst only 28% agreed and the remainder disagreed.

14.6.1. Additional comments provided by respondents highlighted the varying ways in which a 16-year old can appear to be considered both an adult, and a child under the eyes of the law. For example, an individual under 18, but over 16 can own property, marry with their parents' permission and join the armed forces, but are unable to vote, buy alcohol or buy a house in most circumstances.

14.7. Over a third of respondents (35%) disagreed or strongly disagreed with making statutory wills available to testators who have died during, or prior to carrying out statutory will procedures, commenting that the proposal may be difficult to use in practice as a result of the often varying and complicated circumstances that must be considered by the court.

14.8. CILEx would therefore ask for additional consideration and consultation ascertain the demand for reducing the age at which a testator can make a statutory will, and the potential impact this may have only the procedures that are currently used in the statutory will-making process.

15. 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?

15.1. CILEx has encouraged its members to share their proposals for reform directly with The Law Commission.

Chapter 4: Supported Will-Making

16. Question 14: Do consultees think that a supported will-making scheme is practical or desirable?

16.1. The majority of respondents (78%) agreed or strongly agreed that a supported will-making scheme should be introduced in England and Wales in order to satisfy the UK's obligations under the United Nations (UN) Disability Convention.

16.1.1. Members highlighted concerns that the current arrangements do not go far enough to support individuals who lack the capacity to write a will, and that more time and appropriately tailored support may effectively overcome this barrier, therefore increasing the number of people who can write a will in England and Wales.

16.2. Respondents also indicated that the provision should be provided in law through primary legislation, with further detail provided in regulations as opposed to being provided through informal guidance to individuals and professionals.

16.2.1. 81% of members agreed or strongly agreed with a statutory approach compared with 36% who agreed or strongly agreed that informal guidance would be a better option.

16.3. As a result of our member response, and our efforts to ensure that all individuals have access to all areas of justice that are available to them, CILEx recommends that a supported will-making scheme be introduced in order to provide vulnerable testators with a scheme that would not only provide them with much needed support, but would also satisfy the UN Disability Convention.

(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?

16.4. Of a list of persons provided in the survey, respondents agreed or strongly agreed that; Independent Mental Capacity Advocates (88%), Court of Protection Deputies (82%), Professional attorneys appointed under a Lasting Power of Attorney (71%) and Care Act Advocates (69%) are suitable persons for the position of a testator supporter in cases where one is required under the proposed supported will-making scheme.

16.5. A small majority of respondents, however, disagreed or strongly disagreed that Family members or very close friends acting as an attorney appointed under a Lasting Power of Attorney (59%), family members or very close friends (59%), family members or very close friends (59%, family members or very close friends acting as carers or support workers (56%), and professional care workers or supporters (44%) are suitable persons for the position of a testator supporter in cases where a supporter is required under the proposed supported will-making scheme.

16.6. Respondents were conflicted over the extent to which non-professionals, friends or family members should be provided with the opportunity to be a testator supporter.[17]

16.6.1. 39% of respondents disagreed or strongly disagreed with the proposal that both non-professional and professionals should be able to act as a testator supporter under the proposed supported will-making scheme, highlighting that whilst being able to provide sufficient support, there is a greater risk that non-professionals could place undue influence on the testator.

16.7. However, when asked if the problems associated with undue influence in the case of a non-professional testator supporter, and conflicting with the UN

[17] For example, while one respondent commented that "If this is to work someone with a knowledge of the person concerned and who has a relationship with that person would be advisable," other respondents commented that "Wills should not come under influence from any person who potentially stands to lose or gain from the contents of the will," and that "there would be too much scope for fraud."

Disability Convention which requires supported decision-making to be available to all for free (or basically free in the case of a professional testator supporter), 72% of respondents agreed or strongly agreed that these problems are worth risking in order to provide adequate support to testators who lack mental capacity.

16.8. It is clear to CILEx that our members are keen to ensure that testators who lack capacity are provided with a suitable amount of support that would allow them to write a will, however there are risks which must be considered in more detail. CILEx would therefore welcome additional consideration and consultation on the issues surrounding supported will-making and its potential financial impact on vulnerable testators.

(3) should supporters be required to meet certain criteria in order to act as a supporter and, if so, what those criteria should be?

16.9. A majority of respondents (83%) agreed or strongly agreed that testator supporters should meet certain criteria in order to act as a supporter under the proposed supported will-making scheme, commenting that the criteria could include meeting specified levels of; honesty, empathy, independence, integrity, communication skills, and training in the general procedures involved in will-writing, testamentary capacity, mental capacity and the boundaries between support and influence.

(4) how should supporters be appointed?

16.10. A larger proportion of respondents (83%) agreed or strongly agreed that testators should be able to choose their supporter, and if deemed unable to do so due to their mental capacity, a supporter will be assigned to them by the court. This is compared to the proportion of respondents that agreed or strongly agreed that the court should assign supporters only (11%).

16.10.1. Respondents commented that in most cases, testators should be provided with as much say in the decision as possible in order to protect the testators' freedom of choice, unless a testator is unable to choose as a result of a lack of capacity.

(5) what should be the overarching objective(s) of the supporter role?

(6) how should guidance to supporters be provided?

16.11. CILEx has encouraged its members to share their proposals for the overarching objective(s) of the supporter role, and how guidance should be provided to supporters directly with The Law Commission.

(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?

16.12. A significant majority of respondents (82%) agreed or strongly agreed that a fiduciary relationship, like those for attorneys and deputies, be created between a supporter and the person he or she is supporting whereby the supporter would be prevented from; taking advantage of their position, being a supporter in cases where personal interests would conflict with his or her duties as a supporter, nor should they be permitted to use their position for personal benefit.

16.13. Although respondents were agreeable[18] when provided with other proposals including imposing a rule that a supporter (whether professional, spouse, civil partner, cohabitant or family member) would not be able to benefit under the person's will, a greater proportion of members indicated that a fiduciary relationship would be more suitable in effectively ensuring the role of supporters to testators is not abused.

16.13.1. 69% of respondents also agreed or strongly agreed that if a fiduciary relationship safeguard were introduced, the relationship between the supporter and the testator should be defined as a "fiduciary relationship".

Chapter 5: Formalities

17. Question 15: We invite consultees' views on whether the current formality rules dissuade people from making wills.

[18] 59% agreed or strongly agreed with introducing this safeguard

Written wills

17.1. 71% of surveyed CILEx members disagreed or strongly disagreed that current formality rules regarding a will being in writing deter people from making wills.

17.1.1. Members largely referred to the potential impact of moving away from written wills, including the loss to the perception of wills as a legal document of sufficient importance to be entered into with due consideration, and the potential decline in the quality of wills.[19]

Testator signatures

17.2. 79% of respondents disagreed or strongly disagreed that requiring a testator's signature deterred them from making a will, arguing that the current requirement was appropriate.

Signatures made or acknowledged in the presence of witnesses

17.3. 71% of surveyed members do not agree that the requirement for a signature to be made or acknowledge in the presence of witnesses deters people from making a will.

17.3.1. CILEx supports the Commission's view that having two witnesses strikes the right balance between ensuring the integrity of the will, and not introducing unnecessary burdens.[20]

Signing on testator's behalf

17.4. We asked CILEx members if they felt that the ability for someone to sign on a testator's behalf was deterring people from making a will. 83% disagreed or strongly disagreed.

17.4.1. We believe this is largely because the ability to sign on a testator's behalf is an enabling measure, and one perhaps that fewer testators are aware of.

Signature by a witness

[19] A respondent said "Clients using a professional will writer are rightly expecting the will to be written for them so literacy issues are irrelevant. I can imagine that for people who cannot write for themselves for whatever reason may like the idea of being able to create a video or audio recorded will although this may be difficult to have 'witnessed'. Although perhaps not if the witnesses were 'present' in the recording."

[20] A respondent said "I believe the need for two witnesses is reassuring because a single witness is more likely to give rise to potential fraud."

17.5. 83% of respondents disagreed or strongly disagreed that requiring the signatures of witnesses deterred people from making wills.

17.5.1. Respondents' additional comments recalled CILEx and The Law Commission's view[21] that two witness signatures strikes the right balance between ensuring the integrity of the will, and not introducing unnecessary burdens.[22]

Attestation

17.6. 79% of respondents disagreed or strongly disagreed that the formality rules regarding attestation deter people from making wills.

17.6.1. Respondents provided additional explanation as to why they felt that the formality rules regarding attestation have little to no impact on individual's ability or desire to make wills.[23]

Dating a will

17.7. 79% of respondents disagreed or strongly disagreed that the formality rules regarding dating a will deter people from making wills.

17.7.1. Throughout the survey members commented that since there is no requirement to date a will, individuals are not deterred as a result of having to complete an additional formality stage. However, this is not to say that introducing a requirement to date a will would also deter people in England and Wales from making wills.[24]

Foreign Wills

17.8. 71% of respondents disagreed or strongly disagreed that the formality rules and exemptions regarding foreign wills deter people from making wills.

17.8.1. Respondents who agreed or strongly agreed (14%) that the formality rules and exemptions regarding foreign wills highlighted a

[21] See paragraph 17.3.1

[22] A respondent said "I believe the need for two witnesses is reassuring because a single witness is more likely to give rise to potential fraud."

[23] A respondent said: "individuals understand the rules regarding attestation, including those that use Will kits or online will writing services which permit / require lay-execution as they generally give quite clear instructions for signatures."
A respondent said: I think every person accepts that having a Will witnessed is necessary and these formalities are a protection so should not be changed."

[24] See paragraphs 69.1 and 69.2 for additional discussion of issues associated with dating a will.

number of issues that can often impact upon a testator's willingness to write a will.[25]

18. Question 16: We invite consultees' views on what they see as being the main barriers to people making wills.

18.1. CILEx has encouraged its members to engage directly with The Commission in order to provide, what they believe to be, the main barriers to people making wills.

19. 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?

19.1. CILEx concurs with the significant majority (88%) of respondents who agree or strongly agree with The Law Commission's proposal that a person who signs a will on behalf of the testator should not be able to be a beneficiary under the will.

19.1.1. Respondents' comments highlighted that the rules currently in place fail to prevent cases of undue influence, duress and conflict of interest to an adequate degree. As a result, the Commission's proposal of preventing individuals from signing a will on behalf of a testator if they are a beneficiary would help protect vulnerable testators suffering as a result of fraud or undue influence, especially since the witnesses are not required to read the will or understand who will benefit from said will.

20. 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

[25] A respondent said: "The law of any jurisdiction is complex enough, and the inability for most UK lawyers to deal with foreign jurisdictions presents a client with dual instruction, which greatly increases cost, and is a deterrent."
Another respondent said: "Testators with foreign assets often appear unsure how to proceed."

testator, should be void, but the will should otherwise remain valid. Do consultees agree?

20.1. CILEx and a majority of respondents (94%) agree or strongly agree with The Law Commission's proposal 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.

20.1.1. Respondent's additional comments reflected those provided in 19.1.1, highlighting that married and civil partnership couples often consider their assets as collective, so the risk of fraud and undue influence still exists in these cases. Respondents also emphasised that where a gift is void in these cases, the will should remain valid.

21. 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?

21.1. 81% of respondents indicated that a gift to the cohabitee of a person who signs the will on behalf of the testator should be void.

21.1.1. Respondents referenced previous comments regarding the risks of undue influence, especially in cases where the testator is considered vulnerable or elderly.[26]

22. Question 20: We provisionally propose that a gift in a will to the cohabitant of a witness should be void. Do consultees agree?

22.1. 76% of respondents agree or strongly agree with The Law Commission's proposal that a gift to a cohabitee (or other family member) of a witness should be void in order to prevent fraud, duress and undue influence.

22.1.1. Respondents referenced previous comments regarding the risks of undue influence, especially in cases where the testator is considered vulnerable or elderly.[27]

[26] See paragraphs 19.1.1 and 20.1.1

23. 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?

23.1. 65% of respondents agreed or strongly agreed that gifts in a will to the parent or sibling of a witness, or to other family members of the witness should be void.

23.1.1. In addition to emphasising the need for witnesses to be independent and free from being able to unfairly influence the will of the testator, respondents also highlighted that these relationships pertaining to a witness could all potentially lead to undue influence or duress.

23.2. However, 24% of respondents disagreed or strongly disagreed that gifts in a will to the parent or sibling of a witness, or to other family members of the witness should be void.

23.2.1. Respondents expressed their concerns with drawing a line for testators that would strictly prohibit certain family members of a witness from benefitting from a gift in a will. Respondents added that this could make drafting and executing a will more complicated and as a result, may deter people from making wills. This could subsequently impact upon The Law Commission's aims to increase the proportion of individuals having wills written in England and Wales.

23.2.2. The proposal considered by The Law Commission may therefore have to specify what is meant by the term "family members." CILEx and a number of respondents suggest that those listed under the Intestacy Rules would be a convenient and easily transferable definition of family members for this purpose.

23.3. As a result of our members' comments and indications, CILEx would cautiously propose that gifts in a will to the parent or sibling of a witness, or to other family members of the witness should be void. However, we would also propose that further consideration be given to the breadth of family members

[27] See paragraphs 19.1.1 and 20.1.1

that would be prevented from benefitting from a gift in a will as a result of being related to the witness.

24. Question 22: We invite for consultees' views on whether it should be possible, in defined circumstances, to save a gift to a witness that would otherwise be void.

24.1. In addition to encouraging members to share their opinions directly with The Law Commission in regards to whether it should be possible, in defined circumstances, to save a gift to a witness that would otherwise be void, a number of members indicated to CILEx that in any circumstance, it would likely prove too complicated to legislate for exemptions like those proposed.

24.2. A number of members did provide CILEx with suggestions[28], however we must emphasise that these were in the minority when compared to respondents who felt that it was either too complicated to legislate for, or that there should not be any circumstances in which a gift could be saved for a witness that would otherwise be void.

25. Question 23: We provisionally propose that the reference to attestation in section 9(d)(i) of Wills Act 1837 be removed. Do consultees agree?

25.1. 57% of respondents disagreed or strongly disagreed with The Law Commission's proposal that the reference to attestation in section 9(d)(i) of Wills Act 1837 be removed.

25.2. Although 21% of respondents agreed with The Law Commission's proposal, citing that the reference to attestation serves little to no purpose, and that the requirement to sign as a witness should be enough, the majority of respondents commented that the current rule is suitable and is essential in protecting testators from undue influence[29].

[28] A respondent said: "Where the witness is the only possible beneficiary, or where the gift does not adversely affect other beneficiaries of the Will."
Another respondent said: "If the gift was very minor, made by way of thanks for witnessing the Will."

[29] One respondent said: "The witness needs to know they are witnessing a will, not the contents thereof, so it follows (in my view) that witness/attestation/signature are all part of the same process. I do not believe that a witness with the knowledge they are witnessing the signature of a will can actually sign themselves without attesting."

25.3. As a result of our members' indications and comments, CILEx would be very cautious in agreeing with The Law Commission's proposal that that the reference to attestation in section 9(d)(i) of Wills Act 1837 be removed. This is despite the arguments presented in *Williams on Will*[30]. CILEx would welcome additional consideration on this issue in order to assess the potential impact this proposal may have on the protection of a testator in regards to undue influence.

26. 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.

26.1. 86% of respondents agreed or strongly agreed with the definition provided in *Williams on Wills* that "attestation simply means that the testator should sign in the presence of two witnesses who must then attest and sign (or acknowledge) their signatures in the testator's presence."[31] Respondents commented that this requirement for attestation is simple, clear, and easily understood.

26.2. Similarly, 86% of respondents also agreed or strongly agreed that attestation should apply in all cases, including those where the witness acknowledges his or her signature in the testator's presence.

26.2.1. Additional comments emphasised the importance of the witnesses being present when the testator is signing the Will or when attesting to his signature. This, respondents argued, helps avoid cases of undue influence.

26.3. As a result, CILEx agrees that attestation should 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 apply in all cases,

[30] R F D Barlow, R A Wallington, S L Meadway, J A D MacDougald, Williams on Wills (10th ed 2014)
[31] Paragraph 5.63 of the consultation document *Making a will.*

including those where the witness acknowledges his or her signature in the testator's presence.

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

27.1. 64% of respondents agreed or strongly agreed with The Law Commission's proposal that holograph wills should not recognised as a particular class of will in England and Wales.

27.1.1. Respondents commented that all wills, to the greatest possible degree, should conform to current requirements, and as a result, holograph wills are more open to cases of fraud. Additional concerns were raised as to the impact holograph wills could have on the number of non-professional wills. Non-professional wills, it can be argued, are more likely to cause legal and practical problems during administration of an estate, and as a result, should be avoided.

28. 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?

28.1. In addition to the 93% of respondents who agreed or strongly agreed that the provision for privileged wills should be retained, 79% also agreed or strongly agreed that the scope privileged wills have should be extended to civilians who are subject to service discipline within Schedule 15 of the Armed Forces Act 2006.

28.1.1. Respondents agreed that since they are subject to the same risks and are subject to service discipline, individuals may find it more difficult to make a will, when compared to those not serving in the

British armed forces or in combat zones. A number of additional points of consideration were also highlighted by our respondents.[32]

28.2. CILEx agrees with The Law Commission's proposal, and would subsequently welcome the change that would see the provision for privileged wills retained, but 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.

29. 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.

29.1. A significant proportion of respondents (60%) indicated that they have yet to experience a case in which a will was deemed invalid as a result of non-compliance with formality requirements like those provided in the questions above.

29.2. However, CILEx is cautious in suggesting that this is the case for the majority of all our will-writing practitioners. As a result, CILEx has encouraged its members to engage directly with The Law Commission.

29.3. The most common reasons why wills were deemed invalid, according to respondents that indicated that they had experienced cases in which a will was deemed invalid as a result of non-compliance with formality requirements, include; issues with witnesses, not having 2 witnesses present at the same time for example, and wills not being correctly signed or executed.

[32] A respondent said: "If personnel are to be deployed at little notice, their wishes would almost certainly not be able to be carried out under the 'normal' regime for creation/execution of a will. If anything, this should be broadened to include other professions which carry a high risk of death - miners, oil rig workers, fisherman etc."
Another respondent said: "Though members of the privileged groups should have the opportunity to make Wills before being on active service the facility for them to make Wills when on operations should be retained for the protection of their loved ones."

30. 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;

30.1. Respondents, on balance, were split as to whether a power to dispense with the formalities necessary for a valid will should be exercised by the court. A small majority of respondents (40%) agreed that the power should be exercised by the court. However, 30% disagreed or strongly disagreed with the same proposal.

30.2. Additional analysis found that respondents were more agreeable when asked specifically if The Chancery Division of the High Court should be provided this power.[33]

30.2.1. Respondents commented that The Chancery Division of the High Court provided greater levels of expertise than The County Court, probate registrars and legal professionals.

30.3. As a result, CILEx agrees with The Law Commission's proposal that a power to dispense with the formalities necessary for a valid will be introduced in England and Wales which would be exercised by the court providing, however, The Chancery Division of the High Court be handed this power.

(2) apply to records demonstrating testamentary intention (including electronic documents, as well as sound and video recordings);

30.4. As with respondents' concerns' regarding electronic wills and video wills[34], respondents also expressed reservations regarding the proposed power applying to records demonstrating testamentary intention (including electronic documents, as well as sound and video recordings).[35]

[33] 73% of respondents agreed or strongly agreed that if interest-based dispensing powers were to be introduced to England and Wales, that The Chancery Division of the High Court should be able to determine the validity of a will as a resulting of having the dispensing power.

[34] See paragraphs 32.1–32.2, 35.1 and 36.1.

[35] 45% of respondents disagreed or strongly disagreed with The Law Commission's proposal that the dispensing power should apply to records demonstrating testamentary intention (including electronic documents, as well as sound and video recording).

30.4.1. Respondents commented that the proposal could be open for fraud, malpractice and misinterpretation. As a result, CILEx would welcome additional consideration and consultation regarding this issue.

(3) operate according to the ordinary civil standard of proof;

30.5. An equal proportion of respondents (36%) agreed and disagreed with The Law Commissions proposal that the dispensing power should operate according to the ordinary civil standard of proof.

30.6. CILEx is conscious of the potential complexities that may arise from introducing separate standards of proof within the civil jurisdiction.

30.7. As a consequence of our members being split on this proposal, and the somewhat equal dispersion of opinions among our respondents on other proposals regarding the proposed dispensing power, CILEx would welcome additional consideration and consultation regarding this issue.

(4) apply to records pre-dating the enactment of the power;

30.8. Respondents, on balance, were split in regards to whether the dispensing power should apply to records pre-dating the enactment of the power. 27% of respondents agreed or strongly agreed with The Law Commission's proposal, whilst 36% disagreed with the same proposal.

30.9. As a consequence of our members being split on this proposal, and the somewhat equal dispersion of opinions among our respondents on other proposals regarding the proposed dispensing power, CILEx would welcome additional consideration and consultation regarding this issue.

(5) allow courts to determine conclusively the date and place at which a record was made. Do consultees agree?

30.10. A small majority of respondents (46%) agreed or strongly agreed with The Law Commission's proposal that the dispensing power should allow courts to determine conclusively the date and place at which a record was made.

30.11. However, as a result of the proportions of respondents that; disagreed or strongly disagreed (18%), and neither agreed nor disagreed (36%), CILEx would welcome additional consideration and consultation on this issue.

31. 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?

31.1. Although 45% of respondents agreed or strongly agreed with The Law Commission's proposal that a compulsory system of will registration should not be introduced, a significant proportion (36%) disagreed or strongly disagreed.

31.1.1. Respondents that agreed with The Law Commission's proposal commented that reform should not take place as a result of their concerns over intervention and centralisation, which may have an impact on the regulation of will registration, and the additional costs that may prohibit a testator from writing a will, changing their will or re-registering a will.

31.1.2. Respondents that disagreed however highlighted that registration would establish greater certainty for testators and will-writers, further ensuring that abuse of wills as a result of "disappearing" wills does not occur also.

31.2. Despite the arguments for establishing a system of compulsory will registration, CILEx and some respondents are concerned of the costs implications a system like this will have on testators. Additional costs will likely impact vulnerable testators to a greater degree, and will likely deter more people from making wills, hindering one of The Law Commission's primary goals.

Chapter 6: Electronic Wills

32. 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?

32.1. A majority of CILEx practitioners surveyed expressed reservations about this proposal. There were real concerns amongst practitioners in relation to the high risk for potential fraud, were this permitted and the fact that, in particular, the vulnerable and the elderly could be susceptible to it. For example, if the whole will-making process was carried out online, there would be no real way of testing if any coercion had been applied in the making of that will; or testing/understanding the individual's mental capacity to make the will might be more difficult.

32.2. An electronic process might also be exploited by others for the purposes of money laundering. It was therefore suggested that secondary legislation may not be the best process to affect these changes, and that Parliament needed proper scrutiny with which the use of change by primary legislation would enable.

32.3. There was not universal opposition: some felt that in the right circumstances or in certain specified (emergency) situations an electronically produced will and signature could be permitted. Additionally, the whole process of two independent witnesses could ensure that the Testator is protected in the process and is able to express his/her wishes. However, the right legislative provisions would, it was suggested, have to be in place in order to ensure that this worked effectively. Others suggested that such arrangements should only actually be permitted once proper, secure electronic means had been

identified and ‘tried and tested’. This might also go some way to mitigating any risk of hacking or other abuse of electronic systems.

33. 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?

33.1. A majority of CILEx practitioners surveyed agreed with The Law Commission’s proposal 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).

33.2. This general view was again linked to the feeling that an electronic process was too susceptible to fraud, undue influence and duress. Were this to happen, it in turn could see the number of claims against estates increase. Whilst there is software and hardware that would enable the taking of an electronic signature to ensure that section 9 of the Wills Act has been complied with, it would be harder to ensure that the electronic signature is that of the testator.

34. Question 32: We ask consultees to provide us with their comments on, or evidence about:

(1) the extent of the demand for electronic wills;

34.1. A majority of CILEx members surveyed had experience of working with wills that had been prepared electronically. There was considerable variation in experience, however: 57% indicated that between 95% and 100% of the wills they worked on were electronic, whereas for 34% of the sample that figure was between 0% and 5%. The rest were broadly 50/50 electronic and paper-based wills. This likely relates to established, customary practice as only 10% indicated that they had ever been asked to prepare a will digitally. Though there may be some general expectation that, ‘in the 21st century’, this sort of format might reasonably be expected to be available, there is little evidence

offered from the perspective of CILEx members surveyed therefore. Again, this most likely links with the general indication of concern about the risks of electronic formats and processes running through the survey results.

(2) the security and infrastructure requirements necessary for using electronic signatures in the will-making context.

34.2. Of the methods outlined in Chapter 6 of The Law Commission's consultation paper, less than 5% of CILEx members surveyed indicated that either 'typed names and digital images of handwritten signatures' or 'Passwords and PINs' were secure enough means of electronic signature. It was felt these methods were too open to fraud, being hacked or stolen.

34.3. 'Biometrics' was seen much more secure though still open to fraud to some degree. 30% or practitioners surveyed favoured this security infrastructure, though 50% still felt it was not satisfactory. This dissatisfaction was mainly derived from qualms related to the complexity and cost of the solution, and a lack of experience of how it would actually work in practice. It was felt that the specifics of what might be proposed in relation to the use of biometrics would have to be analysed and understood before it was accepted as an appropriate and effective security infrastructure.

34.4. In relation to 'digital signatures', notwithstanding that this is the most secure form of electronic signature, 15% of those surveyed agreed that this was an appropriate process, with 65% disagreeing that it was. The reticence in relation to this option seems mostly around its practicality and its resistance to fraud.

34.5. Having analysed the results of its survey in relation to this question in particular, CILEx is of the view that much more detail about the preferred electronic signature process is required before practitioners can be confident, and can therefore assure their clients, that they are truly secure methods. Lack of understanding, of the accompanying safeguards that will be out in place of the efficacy and utility of the encryption methods and encryption key system used if required before that confidence will be forthcoming.

35. 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?

35.1. Respondents, as with other questions related to electronic wills, expressed reservations regarding the use of electronic wills in practice, and the susceptibility of this form of will to fraud, undue influence and duress. It is reasonable to suggest that the development of other types of wills, including those that are electronic, should at all costs provide testators with the same abilities and powers as they currently have with written wills.

35.2. The difficulty in being able to revoke a will by destruction, which could arise from enabling electronic wills, removes a power from testator's that could prove extremely important, especially in cases of vulnerable testators. This is a serious issue to be considered and we welcome The Law Commission's efforts to measure the extent to which stakeholders and practitioners view the ability to revoke a will by destruction as an important power held by testators that should be protected. However, CILEx will remain of the view that any development in wills should protect the powers of a testator to the greatest possible degree.

36. 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.

36.1. A significant proportion of respondents expressed reservations regarding the proposal for introducing an enabling power that would provide the introduction of fully electronic wills[36]. Respondents also expressed reservations regarding the use of video wills and the extent to which the approval of video wills could

[36] See paragraphs 32.1 – 32.3

impact on cases of fraud, undue influence and the number of non-professional wills created in England and Wales.

36.2. However, a number of respondents throughout the survey highlighted the potential benefits video wills could provide testators, especially those that are considered vulnerable.

36.2.1. Testators who cannot write a will for themselves as a result of a one or a variety of reasons may appreciate, and could certainly benefit from being able to create a video recorded will. However, as a number of testators highlighted, complexities regarding provisions would need to be considered, in addition to how written will procedures including the requirement for witnesses may have to be amended to allow for video wills.

Chapter 7: Protecting vulnerable testators: knowledge and approval and undue influence

37. 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?

37.1. 75% of respondents agreed or strongly agreed that the rule in *Parker v Felgate*, which relates to capacity, should be retained. Respondents highlighted that while this ruling is appropriate in the majority of cases, the contents of the will should remain the same during the time between instruction and execution. Furthermore, the time period should also be carefully considered in order to ensure it is not too long.

37.1.1. Testators with declining capacity can still have long periods of sufficient capacity, but the nature of the illness or condition may mean that the testator may not understand that they are signing a legal document if an extensive period of time has passed since

instructions were taken. This is particularly relevant in cases of testators suffering from dementia.

38. Question 36: We provisionally propose that the general doctrine of undue influence should not be applied in the testamentary context. Do consultees agree?

38.1. Although a majority (60%) of respondents disagreed or strongly disagreed with The Law Commission's provisional proposal, that the general doctrine of undue influence should not be applied in the testamentary context, CILEx is cautious in proposing that reform is necessary.

38.1.1. Since a significant proportion of respondents (40%) neither agree nor disagree with The Law Commission's proposal, CILEx would ask The Law Commission to consult further on this matter in order to provide CILEx members sufficient opportunity additional time to consider this proposal in greater detail.

39. Question 37: We provisionally propose the creation of a statutory doctrine of testamentary undue influence. Do consultees agree?

40. 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.

40.1. Although a small majority of respondents agreed that a structured statutory doctrine of undue influence (55%), or a discretionary statutory doctrine of undue influence (45%) should be introduced, a significant proportion of respondents (45%) indicated that they neither agree nor disagree with The Law Commission's provisional proposals. As a result, CILEx is cautious in proposing that reform is necessary and would encourage further consultation on this matter.

(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.

40.2. Respondents were similarly cautious when asked to indicate whether they agree that under the proposed structured statutory approach, the list of presumed relationships of influence should exclude gifts from a follower to a spiritual advisor. Although cases in which a gift is made to a spiritual advisor are relatively rare according to our surveyed members, respondents did highlight how small religious groups prove to be of significant importance to some testators in England and Wales. In these cases, gifts made to a spiritual advisor may be coherent with a testator's circumstances.

40.3. A number of respondents also indicated awareness of the potential impact undue influence can have in cases where a testator has named a spiritual advisor as a beneficiary.

40.4. CILEx is cautious in proposing that reform is necessary on this matter however. We have therefore encouraged members to share their opinions on whether the list of presumed relationships, under the proposed structured statutory approach, should exclude gifts from a follower to a spiritual advisor directly with The Law Commission.

41. 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.

41.1. 70% of respondents neither agree nor disagree that reform is required to the costs rules applicable to contentious probate proceedings as a result of the proposed reform to the law of undue influence, and knowledge and approval. In addition to asking The Law Commission to consult further on this matter, CILEx has encouraged its members to engage directly with The Commission in order to provide their opinions on 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.

42. 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 a 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?

42.1. A majority of respondents agree[37] with the proposals that the requirement of knowledge and approval should be confined to determining that the testator; knows that he or she is making a will, knows the terms of the will, and intends those terms to be incorporated and given effect in the will.

42.2. The significant level of agreement and the additional comments from respondents suggests to CILEx that, providing all three requirements are applied appropriately and effectively, a testator's last wishes following their death will be carried out accurately.

Chapter 8: Children Making Wills

43. Question 41: We provisionally propose that the age of testamentary capacity be reduced from 18 to 16 years. Do consultees agree?

44. Question 42: Should the courts in England and Wales have the power to authorise underage testators to make wills? If so, who should be allowed to determine an underage testator's capacity at the time the will is executed?

[37] For analytical purposes, respondents were asked about the individual determining factors of the proposal provided in Question 40.

- 87% of respondents agreed or strongly agreed with the proposal that the requirement of knowledge and approval should include the determination that the testator knows that he or she is making a will.
- 93% of respondents agreed or strongly agreed with the proposal that the requirement of knowledge and approval should include the determination that the testator knows the terms of the will.
- 100% of respondents agreed or strongly agreed with the proposal that the requirement of knowledge and approval should include the determination that the testator intends those terms to be incorporated and given effect in the will.

44.1. On balance, respondents were cautious of The Law Commission's proposals that the age of testamentary capacity be reduced from 18 to 16 years. Respondents highlighted a number of issues that may arise from this proposal including; the possible issues that might impact on family members living with the testator under the age of 18, the varying levels of maturity and personal development that exist among 16 to 18 year olds, and the potential lack of appropriate cases in which these circumstances may arise for the reform to be successful.

44.1.1. Despite this however, CILEx and its respondents see the benefits of The Law Commission's proposal. 16 to 18-year olds in some cases may have children of their own, and / or own their own property and assets. Under circumstances such as these, reducing the age of testamentary capacity from 18 to 16 years of age could prove valuable to the testator, their family and friends. However, the number and existence of these types of cases is not known to CILEx.

44.2. CILEx cautiously agrees with The Law Commission's proposals to see the age of testamentary capacity be reduced from 18 to 16 years. CILEx understands that there will be cases in which this change will provide vulnerable, young testators with an important power of determination, however, additional consideration should be given to the concerns raised in 45.1.

Chapter 9: Interpretation and Rectification

45. 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?

45.1. Although a small proportion of respondents agree or strongly agree that statute should not prescribe the order in which a court should address interpretation and rectification, the majority of comments from respondents reasoned that cases in which rectification and interpretation are necessary should be judged in an order at the court's discretion. These comments

largely reflect The Law Commission's conclusion as a result of its own research, which found that statutory intervention would not be helpful in this area.

45.2. As a result, CILEx agrees with The Law Commission's proposal that statute should not prescribe the order in which interpretation and rectification should be addressed by a court.

46. 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.

46.1. Issues surrounding the use of interpretation and rectification seldom impact upon our respondents' according to our own research. CILEx respondents did not highlight any cases in which the order of interpretation and rectification had caused problems in practice in their experience as will-writing practitioners. This finding reflects the research conducted by The Law Commission, which found that there is "little evidence from practitioners that the order of interpretation and rectification causes pervasive problems in practice."[38] However, CILEx would be cautious in suggesting that this is the case across all our will-writing practitioners.

47. 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?

48. 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.

[38] Paragraph 9.43 of Consultation Document

49. 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:

50. 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:

50.1. Respondents were, on balance, cautiously supportive of The Law Commission's proposal to replace sections 23 to 29 of The Wills Act 1837, modernising and clarifying the language of those sections while retaining their substantive effect. Respondents often indicated that repealing sections 23 to 29 may be inappropriate and were, as a result, more favourable to replacement, revision, modernisation and clarification.

50.2. When considering the proposed changes to Sections 23 to 29, respondents clearly indicated caution as a result of the little time to consider the potential impact these changes could have on practitioners and testators. Respondents were similarly cautious when asked about The Law Commission's proposal to repeal both section 30 and 31 of the Wills Act 1837.

50.3. In addition to encouraging members to share their opinions of the proposed changes to The Wills Act 1837 directly with The Law Commission, CILEx would welcome additional consultation and discussion on these proposed changes.

51. 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.

52. 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.

52.1. As a result of the breadth of this question, and the comparative experience of the issues associated with interpretation and rectification our respondents have indicated, CILEx has encouraged its members to engage directly with The Law Commission in order to provide their opinions on the need for any new interpretative provisions in the law of wills, and whether the scope of rectification in the law of wills should be expanded.

Chapter 10: Ademption

53.1. Over half of respondents (57%) agreed with The Law Commission's conclusion that an intention-based approach to ademption should not be introduced in England and Wales, highlighting the potential difficulties that may arise from such a proposal. These include; the extra costs and time that will likely be incurred resulting from increased litigation, the difficulty in requiring executors to try and carry out a gift whilst ensuring that the testators wishes are correctly carried out, and that no other beneficiaries are disadvantaged as a result.

53.2. Two thirds of respondents (67%) similarly agreed with The Law Commission's conclusion in regards to the possibility of replacing ademption with a system whereby if a gift falls out of the estate, the beneficiary should receive the value of the gift instead.

53.2.1. Respondents emphasised that while this may seem fair on the surface, the system could prove costly and time-consuming. Furthermore, it could fail to meet the will and demands of testators who may not have wished to gift the beneficiary a sum of money as opposed to the gift that fell out of the estate.

53.3. 90% of respondents agreed or strongly agreed with The Law Commission's proposal that there should be a provision in the MCA to prevent ademption by attorneys that mirrors the provision that already exists for deputies. Respondents commented that the proposed provision could help ensure

beneficiaries and the person who lacks capacity are protected from inadvertent actions of attorneys and deputies.

54. 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?

54.1. In addition to the 90% of respondents that agreed or strongly agreed with The Law Commission's proposal that there should be a provision in the MCA to prevent ademption by attorneys that mirrors the provision that already exists for deputies, 58% of respondents agreed or strongly agreed that the MCA should be amended to provide that disposal of property by an attorney, where the donor lacks testamentary capacity, does not adeem a gift.

54.1.1. Additional comments provided by responses highlighted the importance this change could have in preventing cases where an attorney, for spiteful reasons, disposes of a testator's property.

54.2. Despite a small majority agreeing with the proposal provided in Question 51, a significant number of respondents emphasised their concerns with the change to the MCA, highlighting that further consideration may be needed in regards to; tax implications (e.g. Capital Gains Tax), inheritance and proof of testamentary capacity.

54.2.1. Testamentary capacity, as previously discussed in this consultation[39], can often be hard to certify, and in some cases capacity can fluctuate for a testator. As a result, it may prove problematic when determining, as a result of The Law Commission's proposal, whether the testator had capacity at the time when the property was disposed of by an attorney.

[39] See Chapters 2 & 3

55. 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?

55.1. On balance, a small majority of respondents (44%) agreed or strongly agreed with The Law Commission's proposal that a specific gift should not adeem where, at the time of the testator's death, the subject matter of that gift has either been sold but the transaction has not been completed, or is the subject of an option to purchase. Instead, the beneficiary of the specific gift that would otherwise have adeemed will inherit the proceeds of the sale.

55.1.1. Respondents commented that this proposal could ensure that in a large proportion of cases, the wishes of the testator are likely to be carried out; subsequently ensuring the beneficiary is not disadvantaged as a result of the gift adeeming.

56. 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?

56.1. 79% of respondents agree or strongly agree with the proposal 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.

56.1.1. Respondents and CILEx agree that this proposal would help ensure that the intentions of the testator are protected and assured despite effects bought about by circumstances beyond their control.

57. 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?

57.1. On balance, the majority of respondents (53%) agreed or strongly agreed with The Law Commission's proposal that a beneficiary should 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. Respondents highlighted that, while these circumstances are rare in their experience, this proposal could ensure that a testator's will is carried out in the closest terms possible considering the circumstances that are likely to be outside of the testator's control. While the gift itself may not be gifted as a result of being destroyed, the proposal would ensure that value of the gift would be provided to the beneficiary.

57.2. It should also be considered that this proposal fails to take into account the sentimental value of a gift; however, CILEx and its respondents are aware that this is already a difficult value to measure.

58. 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.

59. 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.

60. 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.

60.1. Owing to the size and scope of questions 55, 56 and 57, and the comparative experience of the issues associated with ademption our respondents have indicated, CILEx has encouraged its members to engage directly with The Law Commission in order to share their opinions.

Chapter 11: Revocation

61. 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?

61.1. 82% of CILEx respondents agreed or strongly agreed that no reform is required to the law governing the revocation of wills by will or codicil, writing or destruction. Respondents that agreed stated that the current laws are adequate, clear and work effectively.

61.2. However, a number of respondents highlighted that awareness of these rules is an area in which improvement is necessary. Despite their adequacy, members highlighted that in some cases, testators are "completely unaware," of laws governing the revocation of wills. As a result, CILEx agrees with The Law Commission's proposals that no reform is required to the law governing the revocation of wills by will or codicil, writing or destruction. However, we also suggest further consideration be given to the perceived lack of awareness of these laws among testators.

62. 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.

62.1. As part of CILEx's research, respondents were asked, expressing their answer as a percentage, of all testators they had worked with or are currently working with, what proportion were/are aware of the rule that marriage revokes a will. On average, across all respondents, only one-third (34%) of testators were aware that marriage revokes a will.

62.1.1. Our research found that the knowledge of this rule varies to a great degree in our practitioners' experience: 59% of respondents indicated that between 25% and 45% of testators they had worked with were aware of the rule that marriage revokes a will, 24% stated

that between 5% and 20% of their testators were aware of the same rule, and only 12% of respondents indicated that between 75% and 90% of the testators they had worked with were aware of the rule. However, CILEx would be cautious in suggesting that this result can be found across the will-writing sector.

Do consultees think that the rule that marriage automatically revokes a previous will should be abolished or retained?

62.2. 70% of respondents indicated to CILEx that the rule that marriage automatically revokes a previous will should be retained. It must be highlighted, however, that among our respondents, there was disagreement over the extent to which intestacy rules help in situations where testators are not aware that marriage revokes any previous wills.

62.2.1. Respondents explained that, in their experience, it is sensible to presume that in the event of either testator's death, they would likely wish for their surviving spouse to inherit some aspects of a testator's wealth or possessions. However, opinions of the effectiveness of the intestacy rules that dictate what happens in circumstances whereby one testator dies having failed to write a new will with their spouse differed significantly among CILEx respondents.

62.2.2. This is a key consideration to take into account when considering abolishing, or retaining the rule that marriage automatically revokes a previous will, and we welcome The Law Commission's analysis on this issue in their consultation. CILEx would, however, welcome additional consultation on this issue.

63. Question 60: Should testators be empowered to prescribe whether a will or particular dispositions in it should be revoked by a future (uncontemplated) marriage?

63.1. A small majority of respondents (47%) disagreed or strongly disagreed that testators should be empowered to prescribe whether a will or particular dispositions in it should be revoked by a future (uncontemplated) marriage. Comments from respondents, including those from the 26% who agreed with

the proposal, indicated that there is a distinct level of caution surrounding this potential addition to the rules of revocation.

63.1.1. Respondents highlighted that the rules that would apply to this new procedure in wills would require additional consultation in order to avoid potential problems that could arise. Furthermore, respondents considered that this power could confuse testators who would be asked to make a provision for the revocation on a marriage that they have not considered.

63.2. Despite these concerns, respondents commented that this power could provide testators with greater control of their property and financial affairs for the future, as well as bringing to their attention, that any subsequent marriage would revoke the will in question.

63.3. CILEx would welcome additional consultation and discussion on this proposal, including consideration of what would occur in circumstances where a conflict arose between a will that contained these provisions, and a subsequent prenuptial agreement.

64. 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?

64.1. 76% of respondents agreed or strongly agreed that a marriage entered into where the testator lacks testamentary capacity, and is unlikely to recover that capacity, will not revoke a will. Respondents highlighted that in these cases, a testator would likely lack the ability to remedy the situation because of their lack of capacity. As a result, this proposal would help ensure that, to some degree, a testator is treated with dignity and respect.

64.2. However, of the 18% of respondents that disagreed or strongly disagreed, it was highlighted to CILEx that the testator may benefit from a statutory will under current arrangements.

Chapter 12: Mutual Wills

65. 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?

65.1. Respondents were considerably cautious when asked about reforming the law pertaining to mutual wills. Half of respondents (50%) neither agreed nor disagreed with The Law Commission's proposal 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. The same proportion (50%) felt similarly when asked if mutual wills should be placed on a statutory footing.

65.2. Furthermore, when asked if the use of mutual wills should be abolished, a quarter (25%) of respondents disagreed or strongly disagreed, citing that the use of mutual wills, despite their restrictive nature, appears to be useful in cases of second marriages for inheritance purposes, and are used somewhat regularly in our respondent's experience[40].

65.3. Although 44% of respondents agreed that section 8 of the Inheritance (Provision for Family and Dependants) Act 1975 should be amended to provide that property that is subject to a mutual wills arrangement be treated as part of the net estate, CILEx would welcome additional consultation and discussion on this proposal.

Chapter 13: Donationes Mortis Causa

66. Question 63: Do consultees believe that the DMC doctrine should be abolished or retained?

66.1. A small majority of respondents (44%) disagreed or strongly disagreed that the DMC doctrine should be abolished. Respondents highlighted that while the DMC doctrine carries risks, it does provide individuals in difficult circumstances with the ability to give away their assets as they choose.

[40] 25% of respondents stated that they have worked with clients who have sought to make a mutual will often, or very often.

66.1.1. Respondents explained that this is an important consideration given that the circumstances that often require DMCs are as a result of limited time. This limited time can often impact upon the quality of wills that are produced. As a result, the DMC doctrine, while rarely dealt with by respondents[41], can prove useful in providing individuals with the freedom of choice in difficult circumstances.

66.2. A small majority of respondents (41%) agreed or strongly agreed that the DMC doctrine should be retained and subsequently codified in statute. Respondents cited that this may provide clarity and prevent issues associated with abuse and fraud in cases where DMCs are used.

66.3. Due to the small majorities however, CILEx would welcome additional consultation and discussion on this proposal.

Chapter 14: Other things a will could do

67. 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.

67.1. CILEx recognises that this will be of increasing relevance, and we welcome the Commission's consideration of the issue. Respondents highlighted a couple of incidents in which the transfer of digital assets caused issues for the testator, the beneficiaries and the practitioner, though we recognise there will be plenty more.

67.1.1. One respondent briefly described a case in which a residuary beneficiary claimed that files on a deceased testator's computer were "personal to him." In this case, the practitioner (the respondent) found it difficult to discern whether the data on the computer initially belonged to the deceased testator or whether the beneficiary could

[41] 44% of respondents stated that they have worked with clients who sought a DMC, or were a recipient of a DMC gift rarely or very rarely.

in fact claim or prove that the data belonged to him. To add to the complexity of this case, the respondent added that there were also "a number of issues between this particular beneficiary and the executors and other beneficiaries," so it was therefore "difficult to ascertain the objective picture behind each side's emotional telling of the stories."

67.1.2. Another respondent briefly commented that a lack of passwords being provided to executors by a testator could lead to significant issues for the practitioners involved and the beneficiaries who were due to benefit from the testator's will.

68. 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.

68.1. In addition to encouraging CILEx members to engage directly with The Law Commission in regards to issues arising from the requirement to date an appointment of guardianship but not to date a will, respondents were asked to provide details of cases that provided these circumstances.

68.2. Although none of the respondents indicated that they had experienced issues relating to this requirement, CILEx would be reticent in suggesting that this is the case for all of our active and past practitioners.

For further details

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