

MAKING A WILL: A SUPPLEMENTARY CONSULTATION PAPER — SUMMARY

The law governing wills is largely a product of the Victorian era. It is governed by both legislation – primarily, the Wills Act 1837 – and case law, some of which has been developing for hundreds of years. Although in some respects the law of wills has been able to respond to modern circumstances and understandings, we nevertheless think it is in need of comprehensive review, to ensure that the law governing this important topic remains fit for purpose today. Accordingly, the Law Commission is conducting a general review of the law governing wills.

To help our review, this Supplementary Consultation Paper focuses on two specific topics: electronic wills and the rule that a subsequent marriage or civil partnership revokes a will.

Background

The wills project began in 2016. In July 2017, we published the Consultation Paper, *Making a Will*. The public consultation period followed, and closed in November 2017. We then began analysing consultees’ responses and formulating our final policy, to prepare for drafting our final report and an accompanying Bill which will enact our recommendations.

In 2019 we paused the wills project to undertake a project on the law governing weddings, having agreed to Government’s request to prioritise work on weddings. We published our final report on weddings law, *Celebrating Marriage*, in July 2022.

We re-commenced the wills project shortly afterwards. Since then, we have continued analysing responses to our consultation and formulating our final policy.



Glossary

“**Codicil**”: an addition or amendment to a will.

“**Estate**”: a person’s property, money and possessions.

“**Execution**”: the final step in making a will, which must be done in compliance with the formality requirements set out in the law for the will to be formally valid.

“**Intestacy**”: where a person dies without having made a valid will.

“**Probate**”: the legal process under which a will is proved as a valid will.

“**Revocation**”: the formal act of withdrawing a valid will. A will is, by its very nature, revocable by the testator until their death.

“**Testator**”: a person who has made a will.

The Supplementary Consultation Paper

This Supplementary Consultation Paper is a re-consultation on two discrete issues: electronic wills and the rule that a marriage or civil partnership revokes an existing will.

Developments since the time of the Consultation Paper have caused us to re-examine these issues. We suspect that consultees’ views on these issues may also have shifted.

We are unaware of other developments, in the past six years, which would alter consultees’ views on the other issues we are considering within this project. Accordingly, this Supplementary Consultation Paper does not re-examine any of the other issues we considered in the 2017 Consultation Paper.

Electronic wills

The term “electronic will” could have a variety of meanings. Our focus is on whether electronic wills could, or should, be able to comply with the formality requirements for a valid will. Accordingly, we are considering whether, and how, it should be possible for wills to be executed or made using electronic means (which we call “electronically executed wills”) and, if so, whether those wills should be able to be stored and admitted to probate solely as electronic documents (“fully electronic wills”).



At the time of the Consultation Paper in 2017, the case for allowing wills to be made and stored in electronic form was relatively novel. There had been little discussion about the possibility of electronic wills in England and Wales. And when electronic wills had been accepted as valid overseas, they were accepted under dispensing powers, which allowed them to be recognised as valid even though the formality requirements had not been complied with.

The idea of electronic wills is no longer so novel. The last six years have seen increasing recognition of the use of digital documents and signatures in other contexts, such as to make contracts. We have also witnessed huge developments in technology, and there has been an increased adoption of technology in everyday life. The last six years have also seen the COVID-19 pandemic. Technology played an important role in facilitating will-making during this time. To ensure that people could make valid wills when emergency restrictions and social-distancing measures were in place, Government amended the Wills Act 1837 to allow witnessing to take place remotely, over videoconference. Several overseas jurisdictions similarly responded to allow for electronic witnessing, some on a temporary basis, and others permanently. Other jurisdictions have introduced permanent reforms to enable electronic wills.

In the light of these developments, we think that consultees' views on electronic wills might have changed. We are therefore re-visiting the issue in this Supplementary Consultation Paper.

New legislation governing wills provides the opportunity to embrace the prospect of electronic wills. We want to hear consultees' views on them.

However, whether electronic wills could comply with the current formality requirements in the Wills Act 1837 is, in our view, uncertain as the law now stands. To clarify the position, we continue to think that the Wills Act should be amended to exclude the possibility of electronic wills fulfilling the current formality requirements that were devised with paper documents in mind. We consider this is necessary to exclude the possibility of the most basic, and easily amended – and forged – types of electronic documents and electronic signatures from satisfying the formality requirements for a valid will.

We consider that the wills context raises distinct considerations. That is because wills are unique. Wills are unilateral documents which can be and are regularly made without the assistance of any professionals, or any third party at all, other than the two witnesses to the testator's signature. There is no other party to a will, and no state involvement at the time the will is made. They are not subject to any requirement of registration. They are revocable until the testator's death, and until that time they can be kept entirely private by the testator. A will cannot be proved as valid until after the testator dies. Wills therefore operate in a way, and in a context, that is very different to contractual or transactional documents where electronic execution is increasingly commonplace.

As the context of wills is unique, so are the current requirements for them to be accepted as valid. For paper wills, those requirements are set out in section 9 of the Wills Act 1837. As paper wills have their own bespoke requirements to be accepted as valid, we suggest that bespoke requirements will be key to allowing electronic wills to be valid.



The question is therefore how and when bespoke requirements for electronic wills should be introduced. Should a new Wills Act provide that electronic wills are valid, with any detailed requirements (including any technological specifications) set out in separate secondary legislation? Or should a new Wills Act do no more than contain an enabling power, which could allow electronic wills to be recognised as valid in the future? In other words, should electronic wills be enabled on the face of a new Act, or should Government be given power to enable them at some point in the future?

We are keen to hear consultees' views.

Revocation by marriage or civil partnership

By its nature, a will is revocable by the testator until their death. A testator can revoke their will by another will or codicil, by a written intention to revoke, or by destruction. Under the terms of the Wills Act 1837, a will is also revoked by a subsequent marriage or civil partnership.



It is this last type of revocation that we suggest warrants a fresh look in the light of increasing concerns about what are often called “predatory marriages”.

Predatory marriage is where a person marries someone, often someone who is elderly or who lacks the mental capacity to marry, as a form of financial abuse. They might marry an elderly person in order to inherit from them. This issue seems to most often arise in relation to marriage, but it can also arise in relation to civil partnerships.

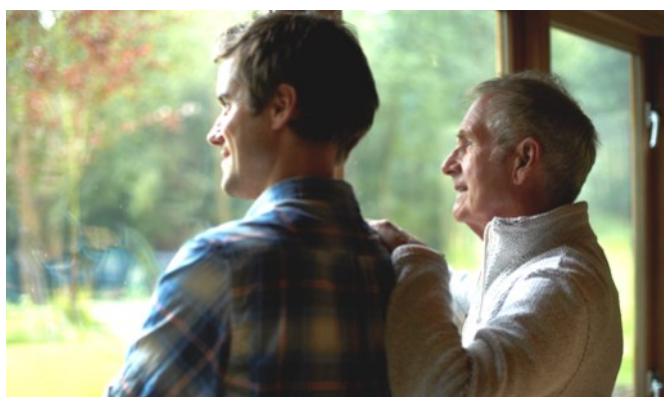
Although in the Consultation Paper we had considered the need for protection of vulnerable testators in relation to the rule that a marriage revokes a will, our understanding of the risk and incidence of predatory marriage was limited. However, in the past few years, concerns about predatory marriages have grown. Consultees raised their concerns about predatory marriage with us throughout the weddings project. The issue has also attracted media attention and has been the subject of questions in Parliament.

The issue of predatory marriages is relevant to revocation because the rule that a marriage or civil partnership revokes a will, together with the intestacy provisions, facilitates this form of financial abuse.

Where a will is revoked by a marriage or civil partnership, in the absence of the person making a new will, the intestacy rules will apply. Under the intestacy rules, the person's spouse or civil partner is likely to receive the majority of their estate, if not their entire estate. Moreover, on intestacy, the spouse or civil partner will have the authority to make funeral arrangements and decide whether the person's body should be buried or cremated, and where it should be interred.

Our considerations in the Consultation Paper focused on the balance of fairness between first and second families, adult children and surviving spouses. We did not consider marriages or civil partnerships motivated by financial abuse, which might not legitimately be seen, or experienced by the testator, as genuine family relationships at all.

In the light of increasing concerns about predatory marriage, we wish to gather evidence of its prevalence, and re-engage with consultees on the question whether marriage and civil partnership should revoke a will.



Responding to our Supplementary Consultation Paper

The Supplementary Consultation Paper is available on our website at <https://www.lawcom.gov.uk/project/wills/>.

The deadline for response is **8 December 2023**.

Comments may be sent to us using the online response form, available on our website at <https://consult.justice.gov.uk/law-commission/wills>.

Where possible, it would be helpful if this form was used. Alternatively, comments may be sent:

by email to wills@lawcommission.gov.uk

or by post to

Wills Team,

Law Commission, 1st Floor,

52 Queen Anne's Gate,

London, SW1H 9AG.

(If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically.)

We ask consultees to avoid including information that identifies themselves or others or confidential commercial information in the text of their response.

For further information about how the Law Commission conducts its consultations, and our policy on the confidentiality of consultees' responses, please see pages i to ii of the Consultation Paper and our webpage: <https://www.lawcom.gov.uk/document/privacy-notice-and-handling-data/>.

