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Overview of the Law Commission's recommendations for Will reform

16 May 2025 Daniel Edwards

What is the Law Commission Project on Wills?

The Law Commission Project on Wills aims to update the Wills Act of 1837 to better reflect contemporary societal changes and address issues such as testamentary capacity, formal requirements for Wills, and protection against fraud.

The Law Commission is an independent body which was established to make recommendations to the government on reform to the law in England and Wales.

Since 2016 there has been a long running project by the Law Commission on the possibility of reform to various parts of law relating to Wills in England and Wales. That project has included two public consultations; one in 2017, and then another in 2023.

Today (16 May 2025) the Commission has published its recommendations for reform of the law on Wills.

This article summarises and discusses the impact of those recommendations.

Why did the Law Commission project on Wills happen?

The Law Commission project on Wills was initiated to comprehensively review and potentially reform the outdated Wills Act of 1837, ensuring the law adapts to significant societal changes and provides clearer, more protective measures for individuals drafting Wills.

The key piece of legislation underpinning the law in this area is almost 200 years old - the Wills Act was passed in 1837, the same year that Victoria I ascended to the throne.

As in any common law system, the law has developed over the centuries with various cases creating new rules or interpreting old ones.

Whilst 'old legislation' is not a good reason for reform in itself, it was felt that, given the changes in society over such a vast amount of time, it was time for a comprehensive review of the law on Wills.

What were the aims of the Law Commission Project on Wills?

The aims of the project were stated by the Commission to be:

1. **To support the exercise of testamentary freedom** – or in other words, to ensure people's wishes are carried out after their death.
2. **To protect those making Wills**, especially from fraud or undue influence; and
3. **To increase clarity and certainty in the law**, where possible.

What are the changes recommended by the Report?

There are many changes proposed. The more comment worthy ones include:

- **Testamentary capacity:** Adopt the Mental Capacity Act 2005's test for all assessments of testamentary capacity to reduce confusion and increase certainty.
- **Formality requirements:** Grant courts the authority to validate wills that do not meet strict formal requirements if the testator's clear and unchanged intentions can be ascertained.
- **Rectification claims:** Expand the types of mistakes that can be rectified by the courts to include errors arising from a drafter's misunderstanding of the language used in the Will.
- **Effect of marriage on Wills:** Abolish the rule that marriage revokes a Will, preventing unintended disinheritance and potential abuses.
- **Electronic Wills:** Allow Wills to be made electronically, ensuring they meet specific security standards to maintain their integrity and authenticity.

1. Clarification on the legal test for 'capacity'

Currently the test for whether a person has the mental capacity necessary to make a Will is from the case of Banks v Goodfellow, which was heard in 1870. The test has been refined at the edges in many cases over the 155 years since, but it remains the foundation stone for disputes over capacity of a testator.

But since 1870 another mental capacity test has been passed into law more generally, this time by means of statute, the Mental Capacity Act 2005. And that test differs slightly to the test in Banks v Goodfellow.

That has sometimes created confusion and uncertainty, and the courts have grappled with how to square those two things against each other, although ultimately the test in Banks v Goodfellow has prevailed.

As a result, the Report has recommended that the test set out in the Mental Capacity Act 2005 should apply to all assessments of testamentary capacity, which seems a sensible step and one that ought to give more certainty and create less confusion.

2. Changes to formality requirements

The Wills Act contains very strict requirements for the signing and witnessing of a Will. These rules are rigid; if they are not complied with to the letter, a Will is not valid. That is the case regardless of how minor the error may seem, and regardless of the consequences.

Whilst that creates a fair degree of certainty, it can sometimes lead to results that may seem unjust. In any circumstances where a Will is invalid as a result of a failure to comply with these strict requirements, the wishes of the Testator Will not have been followed, and a previous Will, or an intestacy, will take effect.

As a result, the Report recommends courts be given the power to make an order providing that an otherwise invalid Will be treated as if were valid.

For that to happen, the Report adds, a court would need to be satisfied that the testator's *"clear and genuine"* intentions can be ascertained, and that those intentions remained unchanged at the time of the person's death.

It will be interesting to see how these recommendations are implemented in the courts, and care will need to be taken to ensure the scope for such claims is suitably narrow so as to prevent a significant increase in litigation in this area.

3. A wider scope for 'Rectification' claims

It is currently possible, in some circumstances, to apply to a court to rectify a mistake (or mistakes) in a Will. However, the scope of that power is rather limited, and broadly speaking is limited to either 'clerical errors' (such as typos) or a failure to understand the testator's intentions.

The law around Rectification can certainly seem complex to non-lawyers, and cases are always very fact specific. They can sometimes produce outcomes that seem unfair; the mistake in the Will might seem glaringly obvious, but if it does not fit within the narrow category of mistakes that can be rectified, then the court's hands are currently tied.

The Report therefore recommends a significant widening of the types of mistake a court can deal with by way of rectification. The Report says rectification should also be an option for mistakes where *"it is satisfied that the Will does not give effect to the testator's intentions because the drafter failed to understand the meaning or direct effect of the language used in the will."*

That may prove particularly helpful with 'home-made' Wills, or those made by others who are less experienced in the area.

4. Marriage should not revoke a Will

It is currently the law that a marriage revokes a Will (unless the Will is specifically made 'in the contemplation of pending marriage'). That is a rule that a lot of people do not know exists. It is also one that can seem a little hard to justify, given changes in society since the rule came about.

It is also one that can be open to abuse; in cases of 'predatory marriage' a Will – that perhaps leaves everything to the testator's children – would in all likelihood be revoked by a marriage. If that person does not then make another Will, on their death their estate would pass by the laws of intestacy, which could result in their spouse receiving their entire estate (or at least the majority of it).

So the Report has recommended this rule is abolished, such that marriage has no effect on a previously made Will.

5. Electronic Wills should be permissible

Given the legislation that governs how an effective Will can be made is nearly 200 years old, it is not surprising that it does not cater for electronic Wills i.e. Wills that do not have 'wet' signatures.

As the Report itself notes, strictly speaking the requirements of the 1837 Wills Act could be argued to be compatible with an electronic Will, but unsurprisingly people do not seem prepared to take the risk, and nobody has ever been bold enough to try and uphold an electronic Will before the courts.

It is not surprising that the Report recommends moving Wills into line with most other types of document in allowing for electronic signatures.

Such 'electronic Wills' will still need to comply with the various formalities around execution and witnessing. In addition, they will need to comply with some additional requirements, so as to ensure that a *"reliable system is used to ensure the security of the Will"*.

In the draft legislation recommended by the Report, this requirement states in full;

> *"a reliable system is used—*
>
> *(a) at the time of the signing of the Will, to link any signature with the person whose signature it is*
>
> *(b) to identify the Will so that it can be distinguished from any copies, and*
>
> *(c) to protect the Will against alteration or destruction other than by the testator or a person authorised or directed by the testator to alter or destroy the Will."*

Quite what is – and is not – deemed to be 'reliable' remains to be seen.

Thoughts

At the moment the law remains as it was prior to the publication of the Report, which of course can only make recommendations.

Law Commission reports can, on occasions, take years to be considered and debated in government. But already today we have seen the government response to the Report, which suggests there is perhaps motivation and intention to have the Report and the accompanying legislation debated in the usual way in the not too distant future.

Watch this space...

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