Bar Council response to the Law Commission's Supplementary Consultation paper on Wills

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission's Supplementary Consultation Paper on Wills.[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Consultation Question 1.

We invite consultees' views as to whether provision should be made so that electronic wills can be valid under the law.

4. We remain of the view expressed in response to the 2017 consultation: we do not believe that there is either any demand for electronic wills, or any substantial reason for promoting them.

5. If a document requires witnessing by two individuals, then the process is necessarily physical. Creating, and then using, some application or software under which two individuals can effectively witness a will is bound to be complex. A single document is entirely

[1] Available here: https://lawcom.gov.uk/project/wills/

straightforward. Storage is arguably more reliable if the document is physical, than if it is electronic. Retrieval is unlikely to be any easier or secure with an electronic document than with a physical document. If it is, then the executed will could be scanned (without the need for any change of the law, since a copy can be proved in the right circumstances).

6. We agree that the experience of wills being executed and witnessed remotely during the pandemic has no relevance to the issue of electronic wills. That process was undoubtedly helpful during the pandemic, but was clunky and not electronic.

7. We suspect that, on the authority of Hudson v Hathway, a Will can already be made electronically, provided the testator and witnesses (who are all present at the same time) each type their names on the keyboard (or even sign on an iPad). Indeed, only the witnesses would need to sign themselves. One of them could sign at the direction of the testator. The question therefore is: should the law interpose to prevent that, presumably unwitting, extension of the Wills Act 1837? We would support legislation that did prevent it (at least until the question of how electronic wills should be made is entirely bottomed out).

8. We understand the good sense, when electronic wills are being prevented from being valid, of including a provision which would permit electronic wills to be introduced by subordinate legislation. That is the next question.

Consultation Question 2.

We invite consultees' views as to whether a new Wills Act should either:

(1) include an enabling power, exercisable by the Secretary of State, for secondary legislation to make provisions that would permit electronically executed wills or fully electronic wills that complied with the secondary legislation to be recognised as valid, or

(2) allow for and outline the requirements for electronic wills to be valid on the face of the Act.

9. We take the view that wills can (probably) already be executed electronically. We consider that this has happened by accident, and is not either an intended or an appropriate outcome. We would like to see legislation which makes electronic wills (as they could currently be made) invalid. We can see that if that is being done, then it is sensible to include an enabling power to introduce electronic wills, when that is appropriate. This is a change from our response in 2017, which started from the position that electronic wills are not currently valid. We took the view then that until there were specific proposals for electronic wills, it was premature to consider enabling legislation. We still consider that it is premature to pass legislation which provides the statutory framework for electronic wills.

Consultation Question 3.

5.3 We invite consultees' views as to whether an enabling power, if enacted, should:

(1) be neutral as to the form that electronically executed wills or fully electronic wills should take;

(2) ensure that the requirements imposed for an electronically executed will or fully electronic will, as the case may be, are able to fulfil the functions served by the current formality requirements to at least the equivalent degree of paper wills executed with a handwritten signature and in person;

(3) require the Secretary of State to obtain the advice of a committee on electronic wills and/or to consult;

(4) require the draft of the secondary legislation to be laid before and approved by resolution of each House of Parliament; and

(5) enable the Secretary of State to make provision to address issues that might arise where electronic wills and paper-based wills co-exist (such as where a paper will is amended by an electronic codicil or vice versa) and/or to mirror or modify elements of the existing law in an electronic wills context (for example, in relation to revocation by destruction).

10. We support (1) above. We do not see there being any practical likelihood that subordinate legislation will be drafted which reduces the safeguards of wills either created or executed electronically. We would be surprised if the Secretary of State did not consult before introducing electronic wills, but if the Law Commission considers there is advantage in making that explicit then we would support that. We would also welcome the opportunity for the Bar to be represented on any committee for the purpose.

Consultation Question 4.

We invite consultees' views about what the formality requirements should be for electronic wills to be valid, if provision is made for their validity on the face of a new Wills Act.

11. We do not support a provision made for the validity of wills on the face of a new Wills Act. We regard that as premature. We also regard it as impractical to try to outline the requirements in advance of drafting the subordinate legislation. It is while drafting that the practical requirements become apparent. At this stage, they are still theoretical. It is quite possible that formality requirements imposed now would either be ineffectual, or – by contrast - too constricting.

Consultation Question 5.

We invite consultees' views on the prevalence of predatory marriage, and welcome any evidence they can provide.

12. One of the contributors to this response (the only one with experience in this field) has come across predatory marriage on some 4 or 5 occasions in a 40-year career. He is only one practitioner in the field. If his experience is representative, that suggests that it occurs on at least a double-digit number of occasions every year. It is also likely to be more prevalent than the occasions which come across the desks of members of the Bar. But what must be appreciated is the seriousness of predatory marriage, and its impact on the victims and families involved. On one occasion of predatory marriage known to a contributor to this paper, the predatory spouse tried to kill the other spouse for financial gain, first by trying to poison him, then by trying to involve him in a car-crash. And no one who has heard Daphne Franks talk about the effect on her and her family of the predatory marriage of her mother, can fail to be moved by their predicament. It is the seriousness of effect which drives the argument for reform, more than the amount of times it occurs**.**

Consultation Question 6.

We invite consultees' views as to whether the rule that marriage and civil partnership automatically revokes a previous will should be abolished or retained.

13. We are of the view that the rule should be – must be - abolished.

14. The rule is itself almost wholly unknown. There is something intrinsically wrong about a rule which effectively tears up an individual's will, without them being remotely aware that that has happened. It is paternalistic, in an era when paternalism is generally rejected.

15. Generally speaking, the rule bites on second marriages. Individuals do not often make wills before marriage (or long-term relationships). It is unsafe to assume that individuals marrying for a second time automatically wish to benefit their spouse to the exclusion of their own children. The more likely assumption will be that (at least initially) each spouse wants their own assets still to pass to their own children, as their existing (but now revoked) will already probably provided. They may, at the same time, wish their estate to be capable of benefitting their surviving (second) spouse, but not to pass to them outright. However, the intestacy provisions no longer include a life-interest in favour of the surviving spouse. That was relatively recently (2014) replaced by an absolute interest in half (in addition to the statutory legacy).

16. The rule is undoubtedly taken advantage of by predators. Experience suggests that predatory marriage has increased since the increase in benefit for a surviving spouse on intestacy.

17. The rule enables, indeed encourages, absolutely appalling behaviour. It would be a wretched dereliction of the rule of law for this permissive facility to continue.

18. If the rule is not abolished, then a statutory provision that an individual's will was not revoked on marriage, where that individual did not have testamentary capacity on marriage, would go some way, perhaps a long way towards solving the problem of predatory marriage. We are disappointed that this option has been ruled out, and believe that the ground on which it has been ruled out is wholly insufficient. While it is true that no one's mind is necessarily turned towards testamentary capacity on marriage, that does not prevent the court from successfully adjudicating on such capacity post-death. The court already frequently has to adjudicate on capacity where there was a homemade will, or where the solicitor or will-writer did not take any steps to satisfy the golden rule. The court on a number of occasions per year effectively overturns the decision of the will-writer/solicitor, or even mental health professional. This is therefore something the court is perfectly capable of doing. It makes no sense to assume that the court cannot do it, and omit to legislate on that basis. Nor is there any justice at all in a rule that revokes a will, in circumstances where the individual is unable to make a new one. That is a gross infringement of the individual's rights.

19. It should not be forgotten that predatory marriage is not the only evil that the rule supports. Even more common are the occasions where a couple have lived together for many years, have long-settled wills which leave the entire estate to the other (or something approaching that provision) and then marry. Their wills are then revoked, and the survivor is forced to fall back on either intestacy provisions or a claim under the Inheritance (Provision for Family & Dependents) Act 1975, which are likely to be far less generous than the unwittingly-revoked wills.

20. It is accepted that it is not perfect for a surviving wife to have to rely on a claim under the 1975 Act. But claims of surviving spouses are generally relatively straightforward to evaluate, given the body of divorce law about matrimonial finance which forms the statutory comparison. The intestacy provisions, being one-size-fits-all, are almost bound to be too generous to the surviving spouse, particularly after a relatively short marriage. Where the marriage has lasted for more than a year or two, it is quite likely that a new will will then have been put in place (provided the parties to the marriage have capacity).

Consultation Question 7.

We invite consultees to share with us any evidence or data they have about the impact of possible reforms considered in this Supplementary Consultation Paper and the 2017 Consultation Paper.

Consultation Question 8.

We invite consultees to share with us any evidence or data to suggest that possible reforms, considered in this Supplementary Consultation Paper and the 2017 Consultation Paper, could result in advantages or disadvantages to particular groups or based on particular characteristics (with particular attention to age, disability, transgender identity, marriage

and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation).

21. It appears to us that the current law on revocation of wills by marriage, where the individual cannot make a fresh will for themselves because of lack of capacity, results in a significant disadvantage to persons with mental disability. If the Law Commission proposes to leave the current law unchanged, then that continues the disadvantages for such persons. It is appreciated that the rule does not conflict with the 2000 International Convention on the Protection of Adults, since that convention excludes issues of succession. But it should not be forgotten that most countries in the world do not accept the testamentary freedom which applies in England & Wales. They have systems of forced heirship which do not benefit the surviving spouse to anywhere near the same degree as revocation of wills by marriage and subsequent intestacy.

Bar Council[2]

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For further information please contact:

Eleanore Lamarque, Policy Manager, Regulatory Issues, Law Reform and Ethics

The General Council of the Bar of England and Wales

289-293 High Holborn, London WC1V 7HZ

Email: ELamarque@barcouncil.org.uk

[2] Prepared by a member of the Law Reform Committee