

## Update – March 2024

### Chapter 1

Section 1.3.2 of the main text described how changing family patterns might affect (views on) succession law and policy. The Office for National Statistics, ('Families and households in the UK: 2022' (2023) 3) reported that while '[m]arried-couple families remain the most common type of family in 2022..., accounting for 65% of all families', 'this family type has been generally declining as a proportion of all families over time (67% in 2012)'. Conversely, "[o]pposite-sex cohabiting couple" was the fastest growing family type over the last 10 years', making up 18% of all families in 2022, 'an increase from 16% of all families...in 2012', and accounting for 'almost three-quarters of the total growth in the number of families in the UK over the ten-year period'. In addition, '[o]f those getting married in 2020, there was a lower proportion of couples where both partners married for the first time compared with 2019; 63.2% of opposite-sex couples and 69.9% of same-sex couples' (Office for National Statistics, 'Marriages in England and Wales: 2020' (2022) 1).

Section 1.3.3 of the main text considered the potentially complex relationship between succession and home ownership. The Department for Levelling Up, Housing & Communities, *English Housing Survey: Headline Report 2022-23* (2023) reported that:

**Owner occupation** remained the largest tenure group, with 15.8 million households, representing 65% of all households in 2022-23. Ownership rates were highest in 2003 at 71% of all households. Compared to 10 years ago, owner occupation has not significantly changed. (p. 5)

In addition:

In 2022-23, most first time buyers (87%) funded the purchase of their first home with savings, 36% reported receiving help from family or friends, up from 27% the previous year, while 9% used an inheritance as a source of deposit, Figure 2.2. While the proportion of first time buyers who receive help from family and friends has recently fluctuated year-on-year, we have seen an overall increase since the first time this was reported...as well as an overall diversification of the source of funds required for a first time buyer deposit – first time buyers now draw on a wider range of sources to make up their deposit. (p. 19)

### Chapter 2

At 2.1.1.2 of the main text, we introduced the 'fixed net sum' or 'statutory legacy', to which a surviving spouse/civil partner is entitled if an intestate also leaves issue. The sum was £270,000 as of 6 February 2020. At 2.2.2.5, we explained that Schedule 1A of the Administration of Estates Act 1925 requires the Lord Chancellor to exercise their power to raise the 'fixed net sum' where there has been an increase of more than 15 per cent in the value of the Consumer Prices Index since the power was last exercised. Due to high inflation, there had been a 19 per cent increase in the CPI by May 2023, and the Administration of Estates Act 1925 (Fixed Net Sum) Order 2023 therefore provides that the 'fixed net sum' is £322,000 for deaths on or after 26 July 2023.

At 2.2.2.1 of the main text, we discussed the fact that a 'decree nisi' of divorce did not itself bring a marriage to an end, so that a spouse could still benefit under the intestacy rules before it was made absolute. Following the amendments made to the Matrimonial Causes Act 1973 by the Divorce, Dissolution and Separation Act 2020, commenced in April 2022, the substantive position is the same in this respect but the terminology has changed. When one or both parties seeks a 'divorce order', it is in the first instance a 'conditional order'. A party to the relevant marriage could benefit on the other spouse's intestacy until the conditional order is made 'final', generally at least six weeks later. A 'dissolution order' relating to a civil partnership is similarly 'conditional' in the first instance.

At 2.2.3.2 of the main text, we noted the possibility of issue receiving a vested interest under the statutory trusts (applicable to intestacy) before the age of 18 if they had entered a marriage or civil partnership aged 16 or 17. Following the commencement of the Marriage and Civil Partnership (Minimum Age) Act 2022, however, a purported marriage entered into by anyone under the age of 18 on or after 27 February 2023 will be considered void. This is irrespective of parental consent etc.

### Chapter 3

We discussed the provisional proposals contained in Law Commission, *Making A Will* (Consultation Paper 231, 2017) throughout the main text. At 3.1.1.1 of the main text, however, we noted that the timetable for completion of the relevant Law Commission project remained under review at the time of writing. The Commission restarted the project in autumn 2022, and published *Making a Will: A Supplementary Consultation Paper* (Consultation Paper 260) in October 2023, with the aim of determining whether consultees' views had changed since 2017. The supplementary paper focused on two discrete issues: electronic wills and revocation of wills by marriage/civil partnership. The Commission's work on these is discussed in the updates to Chapters 5 and 6 below respectively. But the Commission also asked for evidence about the impact, including on equality, of all the provisionally proposed reforms in the project (Consultation questions 7 and 8). The supplementary consultation period closed in December 2023. At the time of writing, the Commission are 'analysing responses to the supplementary consultation and developing [their] final recommendations for reform on all the topics within [their] review'. They 'aim to publish the final Report and a draft Bill enacting [their] recommendations in early 2025' (<https://lawcom.gov.uk/project/wills/>).

The mutual wills doctrine was considered at 3.1.3 of the main text. In *Naidoo v Barton* [2023] EWHC 500 (Ch), an interesting issue arose as to the relationship between that doctrine and undue influence. As explained at 4.2.7.2 of the main text, there is a distinction between the undue influence doctrine that applies to a testamentary disposition and the version applicable in relation to *inter vivos* transactions. The *inter vivos* doctrine can utilise a presumption of undue influence where there is a relationship of trust and confidence and a transaction calling for explanation, while in the testamentary context there is no such presumption and the undue influence must be proven. In *Naidoo*, the issue arose as to which form of undue influence doctrine is applicable to a mutual wills arrangement. HHJ Cadwallader held that it was the

equitable, *inter vivos*, version that was relevant, on the basis that ([2023] EWHC 500 (Ch), para. 40):

...a mutual wills agreement is a contract first, before there is any basis for equity to intervene. Such a contract may be found explicitly in the wills, or explicitly or implicitly outside it. But either way, it is not a testamentary provision, and it lies outside the wills... any mutual wills agreement in the present case did not affect the validity of any subsequent will, or its admissibility to probate. That can only have been on the basis that the probate court is concerned with the validity of a will, rather than constructive or implied trusts to which its dispositions may be subject. Given that, it is impossible to see why a test of undue influence developed for probate purposes and concerned with the validity of a will should be pressed into service to undo a contract giving rise to just such a trust, or (perhaps) the trust itself, where an equitable doctrine, apt to avoid contracts and dispositions, is already available.

On the facts, a married couple, Dr and Mrs Naidoo, made wills that were expressed to be mutual, and the judge therefore found that they were indeed mutual wills. But the purported mutual wills agreement was set aside on the ground of undue influence by the couple's son, Mr Barton, who was the sole beneficiary of the survivor's estate under the arrangement.

The judge found a relationship of trust and confidence between the Naidoos and Mr Barton: they were vulnerable, he had full power of attorney in relation to their affairs, he ran their business and conducted litigation on their behalf, and they clearly trusted, and were dependent on, him. The mutual wills arrangement was, on HHJ Cadwallader's analysis, 'certainly a transaction which calls for an explanation', given that 'it is notorious to lawyers practising in the field that decision to make mutual wills needs to be considered with great care, and will not usually be the appropriate decision, precisely because of its inflexibility, when much may change during the life of the survivor' (para. 85). This reflects the pitfalls of the doctrine identified at 3.1.3.8 of the main text. In the particular circumstances of the case, the survivor (Mrs Naidoo, as it transpired) was 'locked in' to trusting Mr Barton to provide for the rest of the family following her death (para. 85), and the idea that the wills should be mutual originally came from him. No explanation was forthcoming, such that the presumption was raised. The advice the Naidoos received failed to ensure that the arrangement represented an exercise of their free will, and so the presumption was not rebutted.

The effect of the agreement being set aside was that Mrs Naidoo's subsequent and last will, under which Mr Barton was not a beneficiary, could take effect according to its terms, such that another of the Naidoos' children received her estate.

## Chapter 4

In *Hughes v Pritchard* [2022] EWCA Civ 386, the Court of Appeal considered several aspects of the law concerning testamentary capacity, which we discussed at 4.1.2 of the main text. The testator had a moderately severe degree of mental impairment due to dementia, and in 2016 decided, following the death of one of his sons, to make changes to the testamentary arrangements he had recorded in a 2005 will. The testator's solicitor asked the testator's general practitioner to carry out a capacity

assessment, complying with the so-called 'golden rule' (considered at 4.1.2.6 of the main text). The GP concluded that there were no issues with the testator's capacity, that the testator had the necessary clear understanding and that the changes desired were due to family circumstances, albeit that the GP was under the incorrect impression that the 2016 will was to make only minor changes to the position reflecting the 2005 will. Following the GP's assessment, the solicitor drafted the will, having taken detailed notes. The judge nevertheless found that the testator lacked capacity to make the 2016 will, on the basis that he could not appreciate the understandings he had with his late son, his daughter-in-law and his grandchildren (which were the subject of a proprietary estoppel claim that the Court of Appeal remitted for further hearing), that he lacked capacity to understand the extent of a relevant area of farmland, and that he also lacked capacity to understand that the changes were more than what was necessary to 'neaten up' his arrangements following the death of his son.

The Court of Appeal allowed the appeal. Asplin LJ considered *Burgess v Hawes* [2013] EWCA Civ 74 (discussed at 4.1.2.5 of the main text), on the value of evidence where a rational will was prepared by an experienced solicitor. She emphasized that it did not itself impose a true 'presumption' or make the evidence of a solicitor definitive. But Asplin LJ regarded *Burgess* as meaning that:

Where the will is explicable and rational on its face, the conclusion reached by an independent lawyer who is aware of the relevant surrounding circumstances, has taken instructions for the will and produced a draft, has met with the testator, is fully aware of the requirements of the law in relation to testamentary capacity and has discussed the draft and read it over to the testator, is likely to be of considerable importance when determining whether a testator has testamentary capacity (para. 79).

That was the case here. Similarly, the evidence of a medical practitioner should be given considerable weight, and there was no rule that the testator had to be asked about changes in testamentary wishes. Nor was the testator required to justify changes in order to prove capacity since (as we discussed at 4.1.2.2 of the main text) a testator is entitled to be capricious. There was insufficient evidence to suggest that the deceased did not have the capacity to appreciate the complexity of either the dispositions in the 2016 will or the moral claims. The judge was considered to have given insufficient weight to the expert evidence. He had also focused too much on capacity to understand the changes per se, and inappropriately 'import[ed] an aspect of fairness when considering competing claims upon a testator's bounty and a need to justify a change in testamentary dispositions' (para. 108).

At 4.1.2.1 of the main text, we noted the Law Commission's provisional proposal (in *Making A Will*) that the Mental Capacity Act 2005 be used to assess testamentary capacity retrospectively, in place of the *Banks v Goodfellow* (1870) LR 5 QB 549 test. D. Bedford and J. Brook, 'Reform of testamentary capacity: the hidden pitfalls of replacing *Banks v Goodfellow* with the Mental Capacity Act 2005' (2024) 140 LQR 34 have, however, urged caution. They argue that 'there are tensions between the value-neutral MCA and the considerations of moral responsibility with which the *Banks* test is imbued' (at 51), and that 'the *Banks* test is better able to accommodate some of the more complex aspects of autonomy, such as the authenticity of the decision, and the

testator's emotional competence' (at 60). For the moment, views continue to differ on the relationship between the two tests. In *Baker v Hewston* [2023] EWHC 1145 (Ch), Judge Tindal said that although the MCA had not replaced *Banks*, the Act's test was 'in line' with *Banks* (para. 33) and could serve as a 'cross-check' for the *Banks* test (para. 50).

Delusions were discussed at 4.1.2.3 of the main text. The relevant test was the subject of detailed analysis by Falk J in *Clitheroe v Bond* [2021] EWHC 1102 (Ch). She held that a delusion requires a 'false belief' that is 'irrational and fixed in nature' (para. 153). While some earlier cases had focused on whether the relevant individual could be reasoned out of their belief, Falk J did not consider that to be an 'essential part of the test' 'if the requisite fixed nature can be demonstrated in another way, for example by showing that the belief was formed and maintained in the face of clear evidence to the contrary of which the individual was aware and would not have forgotten' (para. 153). The correct approach was to conduct an 'holistic assessment of all the evidence', taking account of:

...the nature of the belief, the circumstances in which it arose and whether there was an evidential basis for it, whether it was formed in the face of evidence to the contrary, the period of time for which it was held and whether it was the subject of any challenge. (para. 104)

At 4.1.2.6 of the main text, we encountered the 'golden if tactless rule' put forward by Templeman J (as he then was) in *Kenward v Adams* (1975) *The Times*, 29 November. The so-called 'rule' suggests that where the testator is old and infirm or where there is doubt as to his mental state, the making of his will should be witnessed and approved by a medical practitioner, who should satisfy himself as to the capacity of the testator and make a record of his findings. In *Goss-Custard v Templeman* [2020] EWHC 632 (Ch), Fancourt J had an unusually appropriate, if tragic, opportunity to consider the 'rule' when adjudicating upon the validity of Lord Templeman's own will. Lord Templeman's younger son and daughter-in-law *inter alia* sought to use Lord Templeman's failure to suggest a medical assessment notwithstanding his own judgments as evidence that he did not have a functional memory and thus lacked testamentary capacity at the relevant time. Fancourt J dismissed the submission and upheld the will, holding that 'the assumed failure to suggest a medical examination is probably evidence of the commonplace that people who are able dispassionately to give good advice to others do not always follow such advice themselves, or believe themselves to be in need of it' (para. 116). He also noted that it would not 'necessarily be easy for an elderly but knowledgeable testator to admit openly to being of doubtful testamentary capacity' (para. 116).

At 4.2.7 of the main text, it was asserted that a person alleging that a will was procured by fraud or undue influence must have clear proof. In *Face v Cunningham* [2020] EWHC 3119 (Ch), Judge Hodge QC accepted the general proposition that the burden of proving fraud or undue influence rests on the party alleging it. But he added an obiter qualification that 'where the forgery of a will is alleged, then the ultimate burden of proving that the will is not a forgery must rest on the party propounding the will, as part of the formal requirements of proving that the will was duly executed by the testator and was duly witnessed' (para. 46). This is a potentially controversial remark, but it may not make much difference in practice. If the propounder appears to have

the benefit of, for example, the presumption of due execution (considered at 5.2.8 of the main text), the practical reality is that the person challenging the will would need to have some evidence of the forgery. In *Sangha v Sangha* [2021] EWHC 1599 (Ch), Deputy Master Bowles agreed with Judge Hodge's remark about the propounder having the ultimate burden, but also emphasised that 'the practical and evidential implications of the existence of this ultimate legal burden of proof must...be seen in the context of the particular allegation of forgery, or fabrication...' (para. 132). The 'inherent unlikelihood...that the will in question has been fabricated and forged, has the effect...that, absent the cogent evidence of fabrication and forgery required to make good that contention, the legal burden, resting upon the proponent of the relevant will, to establish the authenticity of that will, is highly likely to be made good' (para. 136). The forgery was not a live issue when the Court of Appeal considered the case ([2023] EWCA Civ 660).

On the facts of *Face*, the judge found that the will had been completely forged by the alleged testator's daughter, irrespective of the burden of proof. *Inter alia*, Judge Hodge emphasised that there was no evidence from the testator's journal that he had ever made a will; that the terms of the alleged will were 'utterly incredible' in that they would have left his son homeless when the testator's 'main concern in life' was to ensure the son's continued occupation of a particular property; and that the evidence of the circumstances of the alleged will's execution and the 'discovery' of a photocopy of it 'defied belief' and was 'staggering' respectively.

At 4.2.7 of the main text, we noted the high threshold for successfully making out a claim in *testamentary* undue influence as compared to the *inter vivos* doctrine (see further the update to Chapter 3 above). In *Rea v Rea* [2024] EWCA Civ 169, the Court of Appeal overturned the judge's finding that the 2015 will of the testatrix, Anna, was procured by her daughter's undue influence. The 2015 will gave the daughter, Rita, Anna's home (and therefore most of the estate), dividing only the residue between all of Anna's four children. It revoked a 1986 will, which would have divided her *entire* estate equally between the four children. Anna explained her motivation on the face of the will, namely that Rita had been her sole carer for many years but the sons did not help with Anna's care. The judge had found undue influence on the basis, *inter alia*, of Anna's vulnerability and dependence on Rita, as compared to Rita's forceful personality, as well as Rita's failure to give a true explanation of how the 2015 will came to be made, the timing of the will to coincide with two sons' withdrawal of assistance, and Rita's making of the arrangements for the execution of the new will. In combination, he considered the evidential factors:

...all point inexorably to the conclusion that Rita had pressured Anna into making a new will, leaving the house to Rita, not by convincing her mother that this was the right thing to do, but by applying some form of improper influence over her to procure the testamentary gift of the house in her favour, cutting out the sons who had stood to share equally in the estate for almost 30 years. ([2023] EWHC 1901 (Ch), para. 133)

The Court of Appeal, however, disagreed. Newey LJ emphasized that testamentary capacity and knowledge and approval were present, there was no direct evidence of coercion, third parties (including experts) had no reason to believe there was coercion and thought Anna strong-willed, and there was a perfectly rational basis for giving Rita

the house since she had been a live-in carer for six years. He accepted the contention in *Schrader v Schrader* [2013] EWHC 466 (Ch) (considered at 4.2.7.2 of the main text) that undue influence could be established without direct evidence of it. But Newey LJ was also clear that 'the circumstances must be such that undue influence is more probable than any other hypothesis' ([2024] EWCA Civ 169, para. 32). On the facts, coercion was not more probable than any other possible explanation of the 2015 will being made, and was inherently unlikely. In particular, undue influence was thought clearly no more likely than Rita merely *encouraging* Anna to make a new will.

## Chapter 5

The Coronavirus pandemic prompted temporary reform of the formalities in the Wills Act 1837. The virus had a huge impact on many aspects of life, but this was especially true of will-making. 'Social distancing' and 'shielding' created challenges for the satisfaction of the formality requirements relating to wills, particularly if the Law Commission were correct in 2017 that witnesses must likely be *physically* present in the relevant sense for the purposes of section 9 of the Wills Act such that witnessing by video conferencing was not valid (see 5.2.5.2 of the main text). A related issue was that members of the same household were likely to be the most conveniently accessible witnesses at the height of the 'lockdown', but were also likely to be beneficiaries whose benefits would be rendered void if they *did* act as witnesses (see 8.2.2 of the main text). Private client practitioners used apparently ingenious solutions to try to overcome some of the problems (such as 'drive-through' will signings), but the utility of some of the solutions was questionable for reasons of validity. The difficulties were of course particularly acute for those who suddenly became seriously ill and found themselves isolated in intensive care without having previously made appropriate testamentary arrangements.

One possible solution would have been to introduce a 'dispensing power' such as that provisionally proposed by the Law Commission in 2017 (see 5.3.2.1 of the main text). This would allow the courts to admit a will to probate notwithstanding a failure to comply with section 9 of the Wills Act 1837. The possibility of extending 'privileged' wills to deal with the implications of the Coronavirus pandemic is discussed in relation to Chapter 10 below. The answers to the relevant policy questions were not as clear-cut as they might first appear, however. While it could be said that the Coronavirus is illustrative of the precise sorts of circumstance in which a 'dispensing power' would be helpful, it could also be argued that formality requirements are particularly *important* in protecting those who are very seriously ill and vulnerable to hallucinations etc.

After weeks of discussions with relevant organisations (including the Law Society, the Society of Trust and Estate Practitioners and the Law Commission), the Ministry of Justice eventually announced in July 2020 that secondary legislation would facilitate witnessing by video conferencing (Ministry of Justice 'Video-witnessed wills to be made legal during coronavirus pandemic' <https://www.gov.uk/government/news/video-witnessed-wills-to-be-made-legal-during-coronavirus-pandemic>, 25 July 2020). The legislation, the Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020, was made under the Electronic Communications Act 2000. It finally took effect in late September 2020.

The reform was originally intended to apply to wills made on or after 31 January 2020 and on or before 31 January 2022. But in January 2022, it was announced that the validity of electronically witnessed wills would be extended to those made on or before 31 January 2024, for the benefit of testators 'who are forced to isolate either with covid or from another vulnerability' (Ministry of Justice, 'Video-witnessed wills legalisation extended', [https://www.gov.uk/government/news/video-witnessed-wills-legalisation-extended?utm\\_medium=email&utm\\_campaign=govuk-notifications-topic&utm\\_source=e153de54-e5b9-4422-b7ba-bc0bc2f4ac75&utm\\_content=daily](https://www.gov.uk/government/news/video-witnessed-wills-legalisation-extended?utm_medium=email&utm_campaign=govuk-notifications-topic&utm_source=e153de54-e5b9-4422-b7ba-bc0bc2f4ac75&utm_content=daily), 11 January 2022). Importantly, however, it was not extended any further, as confirmed in a parliamentary statement (UIN HCWS234, 1 February 2024). The Government justified the lack of further extension on the basis that the relevant 'special circumstances' no longer applied given that '[i]n-person witnessing of wills is no longer subject to restrictions'.

By virtue of the 2020 order, the pre-existing provisions in section 9 of the Wills Act (see 5.2 of the main text) became section 9(1). A section 9(2) was then inserted, which provides as follows, incorporating a further amendment made by the Wills Act 1837 (Electronic Communications) (Amendment) Order 2022:

For the purposes of paragraphs (c) and (d) of subsection (1), in relation to wills made on or after 31 January 2020 and on or before 31 January 2024, 'presence' includes presence by means of videoconference or other visual transmission.

The 2020 Order provides (in Article 3) that the new definition did not affect any 'grant of probate made', or 'anything done pursuant to a grant of probate' before the Order came into force. The initial date of 31 January 2020 was ostensibly the day on which the first confirmed case of Covid-19 was recorded in the UK. It should be noted that section 9(2) remains on the statute book to provide for the continuing validity of wills made during the relevant period. To be clear, however, section 9(2) does *not* apply to wills made on or after 1 February 2024, which must comply with the law described in the main text.

Detailed analysis of the background to and implications of section 9(2) can be found, e.g., in B. Rich, 'Honora Jenkins and her legacy — laid to rest at last?', <https://medium.com/@abarbararich/honora-jenkins-and-her-legacy-laid-to-rest-at-last-323855c233ca>, 11 September 2020; C. John, 'Remote witnessing of Wills: The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020', <http://equitysdarling.co.uk/2020/09/10/remote-witnessing-of-wills-the-wills-act-1837-electronic-communications-amendment-coronavirus-order-2020/>, 10 September 2020; B. Sloan, 'Witnessing Law Reform in the Coronavirus Era: The Legislation Analysed', Oxford Property Law Blog, <https://blogs.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2020/10/coronavirus-and-electronic-witnessing-wills>, 4 October 2020). A few key matters will be emphasized here.

First, the reform was modest, even if still controversial, since the formality requirements (including the basic 'line of sight' test: see 5.2.5.2 of the main text) remained applicable but were applied in a potentially extended manner. It is significant that the reform related to *witnessing* only: a person signing on behalf of the testator still had to be in the testator's physical presence (see 5.2.3 of the main text). This was

a deliberate and supportable choice, since the scope for fraud etc may increase where the will was potentially never in the physical presence of the testator.

Secondly, the Ministry of Justice guidance (reflected in the eventual legislation) was admirably mindful of possible ways in which the new procedure could be abused, and included some appropriate safeguards. For example, witnessing via pre-recorded video was not accepted, and the testator and the witnesses will had to sign the same copy of the document rather than using 'counterpart' copies. The use of the new provisions was also intended as a last resort, a fact reiterated by the Ministry of Justice when remote witnessing was extended in 2022. Perhaps unsurprisingly, however, there is nothing in the legislation to indicate that. In any event, the 'last resort' message appears to have been largely heeded, at least by the clients of wills and probate solicitors. A survey of relevant members by the Law Society revealed that while 95 per cent of respondents had drafted wills during the various lockdowns, only 14 per cent had done so while making use of video witnessing (The Law Society, 'The use of video witnessing through lockdown', November 2021).

Thirdly, and conversely, solving the overarching practical problem created some new ones. An obvious one was the likely freezing of screens etc, though there was at least the possibility of acknowledging a signature (see 5.2.5 of the main text) after the event where a technical problem prevented the signing being seen. That said, in normal circumstances, both the testator (or the person signing at his direction) and the witnesses would sign the will on a single occasion, after which it would be valid. Under the new procedure, however, each witness would be sent the original will after the testator signed it, and often (at least) a second video call would have to take place in which one or more of the witnesses either signed the will or acknowledged the signature in the testator's virtual presence. If the witnesses were not themselves physically present with each other (expressly permitted by s. 9(1)(d); see 5.2.6.5 of the main text), a third call would be necessary with the testator. Each of these stages introduced delay into the process, with the risk that the testator died before the will is validated and of some uncertainty about the will's date and the effect of intervening capacity loss. The potentially difficult case law on the latter point, considered at 5.2.6.4 of the main text, may have become newly important because of the possible delays involved. There is an unfortunate irony that a process introduced to cope with the possible need for increased urgency in will-making may sometimes have been longer and more complicated than under the pre-existing law.

Fourthly, the fact that each witness might have received the will 'privately' (e.g. by post) meant that confidentiality might be breached and that the will might be interfered with. Usually, the witness is not entitled or expected to be concerned with the substantive content of the will, whereas under the amended law there was a theoretical opportunity to refuse to validate the will until it was amended (e.g. to benefit the witness' child). It was necessary to choose witnesses who are not only non-beneficiaries (see 8.2.2 of the main text), but also ideally who have no expectation, hope or desire for anyone strongly connected to them to benefit under the will. That said, openness about the will's contents from the outset might assist the witnesses in verifying that a document later propounded as the deceased's will was indeed the one that they saw being signed. Another consequence of receipt by post is that a witness could attempt to interfere with the will by (for example) substituting one page for another. The Society of Trust and Estate Practitioners sensibly advised that all those

signing should sign or initial each page to guard against substantive alteration during the process. It has always been the case, in any event, that witnesses need to be chosen carefully.

Fifthly, the fact that a retrospective approach was thought necessary, caused partly by the delay in its introduction, caused some difficulties. While the legislation expressly stated that it will not affect a pre-existing grant of probate, the Explanatory Memorandum published with it asserted that the new definition would apply even where a *grant of letters of administration* had already been made. The apparent purpose was to prevent an electronically witnessed will from unravelling an existing grant of probate based on a 'traditionally' witnessed will, even though the (subsequent) electronically witnessed will is validated by the Order. On the other hand, the Government wished to allow an electronically witnessed will to override the intestacy rules applicable where the deceased left no other valid will, even where the relevant grant has already been made. This is normatively understandable. Overriding a grant in either situation would be disruptive, and potentially give rise to disputes, particularly where assets have already been distributed to ostensible beneficiaries. But while an older 'traditionally' executed will at least represents a version of the deceased's intentions, the intestacy rules may have no relation to those intentions (see generally Chapter 2 of the main text). Any disruption in cases of intestacy might therefore be worthwhile. But while the policy objective may be supportable, it was not necessarily achieved by the legislation. As discussed in Chapter 11 of the main text, a grant of letters of administration (and not one of probate) will be necessary where the deceased *has* left a valid will but has not appointed an executor. The Order did not address that issue. Rich and John's blog posts (above) also consider whether the legislation may even have been invalid because it was partially retrospective in nature.

Perhaps in time the 2020 Order will come to be seen as a modest and appropriate response to deal with an emergency situation, particularly as restrictions on gatherings were variously tightened and relaxed over time. There is a real risk, however, that the reform will be seen as the worst of both worlds: failing to include some of the difficult situations in which would-be testators found themselves during the pandemic, and yet still generating disputes (which may still take years to emerge and be resolved). It is significant that while 59 per cent of Law Society respondents with experience of video witnessing were positive about it (and only 21 per cent negative), 73 per cent of all respondents said they would not use the facility after the pandemic. Concerns cited included the risks of undue influence and future claims, the additional time taken and the difficulties in assessing client capability remotely.

Meanwhile, J. Brook, 'Why video witnessing of wills could sound the death-knell for formalities as an end in themselves' [2021] Conv 252 has predicted that the 2020 Order could lead to a short-term increased focus on compliance with the section 9 requirements. She argues that this, in turn, could 'curtail the current pragmatic approach to proving compliance with formalities' taken by the judiciary (at 254), because of the possibility of video evidence providing incontrovertible evidence of non-compliance. Brook thinks it likely that the publicity resulting from any video-witnessed wills being declared invalid 'will increase demand for, and hasten the introduction of, a statutory dispensing power' (at 254).

The order of execution of a will was covered at 5.2.6.1 of the main text. The assertion made there about the testator signing/acknowledging before the witnesses being 'the only logical possibility [because] until the testator does what he is required to do there is nothing to witness' was expressly approved by the Court of Appeal in *Sangha v Sangha* [2023] EWCA Civ 660. The judges below were considered (obiter) to have erred in holding that the 2007 will was valid where the first witness had signed the will before the testator had acknowledged his signature in the presence of both witnesses.

As noted in the update to Chapter 3 above, the Law Commission's *Making a Will: A Supplementary Consultation Paper* (Consultation Paper 260, 2023) reconsidered (in chapter 2) their provisional 2017 proposals on electronic wills. These were considered at 5.3.2.3 of the main text. The Commission 'continue to think that whether electronic wills are currently capable of meeting the current formality requirements in the Wills Act 1837 is uncertain as it stands' (para. 2.7). They appear to be confident that an electronic document could be 'writing' (para. 2.78; see 5.2.1 of the main text), in light of case law developments in other areas. But they think it 'unclear' that the signature requirement in section 9 of the Wills Act 1837, considered at 5.2.2.1 of the main text, could be met via an electronic signature. They retained their view that specially designed legal rules would be necessary for the effective introduction of electronic wills, and reported that the overwhelming majority of consultees in 2017 agreed with their provisional proposal of an express statutory statement that the current formality rules could not be satisfied using electronic signatures (see 5.2.2.1 of the main text). The Commission retained their own view. The Commission were even sceptical in 2023 that "like for like" replacements of signatures and witnessing with electronic versions' should be introduced because they would not confer the same protection as section 9 of the Wills Act currently does, despite the fact that a 'like-for-like' approach has been taken to electronic wills in other jurisdictions (para. 2.165).

In 2023, the Commission reported that the majority of 2017 consultees had disagreed with their provisional proposal (see 5.3.2.3 of the main text) to introduce an enabling power which would allow electronic wills to be recognised as valid. Some thought it premature to delegate power to the executive to introduce electronic wills without knowing what the formality requirements would be, preferring parliamentary scrutiny, primary legislation and/or independent advice. To an extent, this reflects the question about competence raised in the main text. Others were more fundamentally against electronic wills and thought that they 'did not offer advantages over paper wills in terms of execution, (long-term) storage, or cost, nor would they necessarily be easier to find after the testator's death or make the application for probate easier' (para. 2.44). Concerns included security risks associated with frailties in software and hardware and user error, an increased risk of fraud, undue influence being executed by testators lacking capacity, and confusion over multiple sets of formality rules. Some consultees queried the level of demand now or in the near future for electronic wills, even if others expected such demand and/or were more positive about the implications of electronic wills. There were concerns about the implications of electronic wills for revocation by destruction (discussed in general at 6.2.3 of the main text). As the Commission summarised, '[o]n the whole, consultees were wary of electronic wills' (para. 2.110).

For their part, however, the Commission, clearly influenced by the experience of the pandemic, said that with the passage of time, improvements in technology, and the increasing acceptance of electronic execution in the consumer and commercial

spheres, as well as developments in relation to electronic wills overseas, they were interested to know if consultees' views have changed. They invited consultees' views as to whether provision should be made so that electronic wills can be valid under the law (Consultation Question 1). Their own view was that 'new legislation governing wills should embrace the prospect of electronic wills' (para. 2.113). They speculated both that demand for electronic wills will increase and that 'there could be significant advantages from electronic wills', since '[t]echnology or products may be developed which make electronic wills more attractive to testators, or offer advantages, not yet apparent in the wills context' (para. 2.119), while admitting that 'current technology and processes are (at the moment)' not 'sufficiently accessible, well-understood or trusted among the general public for them feasibly to be used by the vast majority of testators' (para. 2.122). It will be interesting to see what the responses to Consultation Question 1 are: scepticism is still very much present amongst Law Society members about electronic *witnessing* (see earlier in this update), and there may not have been a sufficiently significant shift in views.

If electronic wills were to be valid in principle, the Commission wanted to know whether the enabling power idea should be retained or whether a new Wills Act should 'allow for and outline the requirements for electronic wills to be valid on the face of the Act' (Consultation Question 2).

If the enabling power method is used the Commission asked consultees (in Consultation Question 3) whether the power 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).

The question is framed in a way that largely reflects the Commission's own view of the form that any enabling power might take. If, on the other hand, provision for electronic wills is to be made on the face of a new Wills Act, the Commission asked what the relevant formality requirements should be (Consultation Question 4).

As regards the details of the formality requirements, which would be relevant whether the dispensing power approach or the 'face of a new Act' approach, the Commission expressed a provisional view. They were anxious that the new rules should be functionally equivalent to those currently in section 9 applicable to papers wills, and that they reflect the evidentiary, channelling, cautionary and protective functions of formalities that we discuss at 5.3.1 of the main text. The Commission's view is that '[a]t the least, the most basic types of electronic signatures and the most easily amended types of electronic documents should be precluded from satisfying the formality requirements for a valid will' (para. 2.166). In this context, it is worth noting that a purported will not meeting the required standard in this respect could be accepted as valid via the Commission's proposed dispensing power, which we discussed at 5.3.2.1 of the main text.

As noted above, the Commission's view was that 'as far as possible, any rules for electronic wills should be technology neutral', in that 'the provisions should not be predicated on the use of a particular technology', but instead 'identify features and functionalities that an electronic will should have to satisfy, without setting out how such features and functionalities must be achieved' (para. 2.167). They did recognise, however, that this approach might not be possible, despite the advantages of fostering innovation and addressing the risks of obsolescence.

The Commission did contemplate the possible necessity of additional formalities as compared to paper wills, such as a requirement that the testator's identity be confirmed, that the execution be recorded, that witnesses attest in a particular form, that a specific and particularly secure type of signature is required for the testator, or that the will be registered or stored in a particular way. They also recognised that the introduction of a bespoke scheme for electronic wills would necessitate consideration of how it would interact with other pre-existing aspects of the law of wills, including revocation (considered in Chapter 6 of the main text), the presumption of due execution (considered at 5.2.8 of the main text) and rectification (considered at 4.2.6.5 of the main text).

As discussed at 5.2.3.2 of the main text, video wills (which could not currently be 'writing': see 5.2.1) could in principle have been included within any electronic wills enabling power. A bare majority of consultees, however, thought they should not be so included, and by 2023 the Commission themselves thought that 'video wills have little to commend them' (para. 2.192). While some consultees were positive, citing accessibility and public expectations, others were concerned about difficulties in terms of how the testators expressed their wills, the risk of fraud or undue influence, storage and trivialising the will-making process. The Commission did not think that video wills could perform the same functions at the current formality requirements, including because of 'the rise in deepfakes' since the 2017 Consultation Paper (para. 2.147).

## Chapter 6

At 6.1 of the main text, we discussed the revocation of wills by marriage and civil partnership, governed by sections 18 and 18B of the Wills Act 1837. This was another area reconsidered by the Law Commission: *Making a Will: A Supplementary Consultation Paper* (Consultation Paper 260, 2023), chapter 3. As explained at 6.2.1, a will can be revoked even by a marriage or civil partnership that lacks the true consent

of one of the parties, because such a marriage/civil partnership is voidable rather than void, and presumptively valid until avoided. The Commission set out to reconsider the area of revocation by marriage/civil partnership via its 2023 supplementary consultation paper, because of increasing concerns about what have become known as 'predatory marriage', which is 'one where a person marries someone, often someone who is elderly or who lacks the mental capacity to marry, as a form of financial abuse' (para. 3.2). The potential abuser may marry in order to inherit from their new spouse and, as the Commission put it, this, 'unfortunately, is facilitated by the [general] rule that a marriage revokes a will, together with the intestacy provisions' (para. 3.2). As discussed at Chapter 2 of the main text, the intestacy rules often mean that the surviving spouse or civil partner inherits all of the intestate's estate.

We summarized the Law Commission's 2017 discussion of the revocation by marriage (etc) rule at 6.1.1, 6.1.2 and 6.1.3.1 of the main text. In Consultation Paper 260 in 2023, the Commission reported that few consultees had supported abolition of the rule, despite the fact that most consultees also thought public awareness of the rule was low. Support for the rule was often justified on the basis of its prioritization of the surviving spouse and its likely consistency with the testator's intentions.

As discussed at 6.1.3.1 of the main text, there is an exception to the revocation rule if it appears from the will that the testator was expecting enter a marriage/civil partnership with a particular person and intended that the will should not be revoked by that marriage/civil partnership. We also evaluated the Law Commission's 2017 suggestion that the exception might be widened to include testators who did not wish the will to be revoked by an *uncontemplated* marriage. In 2023, the Commission reported that a majority of consultees did not support such a change, since 'it would require people to make a decision in too much of a vacuum as to the consequences it would ultimately have' (para. 3.19) and would generally render the will-making process more complicated.

A bare majority of consultees did, by contrast, support the Commission's 2017 provisional proposal that a marriage/civil partnership entered into by a person lacking testamentary capacity and unlikely to recover such capacity would not revoke a will. We noted this proposal with qualified approval at 6.1.2 of the main text, and it could have in principle provided something of a solution in some 'predatory marriage' cases. By 2023, however, the Commission themselves had become much more conscious of the predatory marriage issue, largely via the project on the law concerning the solemnisation of weddings that they had completed while the wills project had been paused. In Consultation Paper 260, they were:

...inclined to the view that the concerns with the [revocation] rule cannot be resolved by expanding the existing exception to allow testators...to opt out of the rule in relation to unanticipated marriages or civil partnerships, or by making a new exception for people who lack testamentary capacity at the time of a marriage or civil partnership. (para. 3.31)

They no longer thought that a specific exception for those lacking testamentary capacity was workable, since it would be impractical to expect the registration officer or equivalent charged with, *inter alia*, assessing a person's capacity to *marry* also to assess their ability to make a will, which involves a different legal test. Moreover, the

Commission did not think that widening the existing exception to include un contemplated marriages or civil partnerships would address the problems of either potential predatory marriage or the lack of public knowledge of the rule. Their view in 2023 was that 'rather than attempting to resolve problems through exceptions to the general rule, the rule itself must be more closely considered' (para. 3.36). They continued to think the rule out of step with social norms, and wondered whether consultees' views had changed. They made the interesting point that:

The current law...gives double protection to surviving spouses and civil partners: they benefit from the rule that marriage or civil partnership revokes a will together with the intestacy rules, and are also more likely to succeed than other potential claimants in a family provision claim under the 1975 Act. (para. 3.45)

Such family provision claims are the subject of chapter 9 of the main text. In the context of the 1975 Act, the Commission took the view that 'abolishing the [revocation] rule could be seen as rebalancing the interests of various potential beneficiaries' (para. 3.47).

Ultimately, the Commission's consultation questions on revocation were confined to asking for views and evidence about the extent of predatory marriage (Consultation Question 5) and views about whether the revocation rule 'should be abolished or retained' (Consultation Question 6). Reform of the exceptions to the rule per se are no longer apparently being considered.

Meanwhile, J. Brook, 'Automatic revocation of a will on marriage - a rule that is past its use-by date?' [2024] PCB 20 argues (following detailed historical research) that the enactment of the revocation rule in section 18 'appears to be the result of the interaction of archaic 19th century women's property rights with the desire for simplicity and consistency' (at 27). As Brook explains, '[d]ue to the much reduced property ownership rights that came with the status of being a [married woman], it was not possible for a will made prior to her marriage to continue as a valid will after the marriage, and a woman's will was therefore revoked on marriage' (at 21). Section 18's enactment was seemingly motivated by a desire to treat all wills in the same way, and because a woman's realistically had to be revoked by marriage, that meant *all* wills had to be presumptively revoked by marriage. Brook argues that '[i]t is...time to re-examine the soundness of this rule from a 21st century standpoint, without the blinkers of 19th century property law holding us back from reform' (at 27).

Express revocation was considered at 6.2.1.1 of the main text. In *Sangha v Sangha* [2023] EWCA Civ 660, the testator had assets in both England and India. His 2007 will dealt with all of his assets, while both an earlier will in 2003 and a later one in 2016 expressly dealt only with his Indian property. The 2016 also contained the clause: 'This is my last and final WILL and all such previous documents stand cancelled'. The deputy master had held that the (purported: see the update to Chapter 5 above) 2007 will was revoked in its entirety, while on appeal the deputy judge had disagreed and held that the 2007 will was revoked only in relation to the testator's Indian property. The Court of Appeal agreed with the original conclusion by the deputy master. Nugee LJ engaged in a thorough review of the authorities, including *Lowthorpe-Lutwidge v Lowthorpe-Lutwidge* [1935] P 151 and *Lamothe v Lamothe* [2006] EWHC 1387 (Ch)

and *In the Estate of Wayland* [1951] 2 All ER 1041, all considered in the main text. It was held that the starting point in construing a general revocation clause was that it applied to all previous wills in their entirety. The deputy judge was therefore wrong to take essentially the opposite starting point because the 2016 will was made in India with the assistance of lawyers there and expressly referred only to Indian property. There was no evidence of the testator's actual intention on revocation, and both the correct starting point and the natural meaning of the clause meant that the 2007 will was fully revoked. The potentially countervailing 'presumption against intestacy', considered as the 'golden' rule at 7.3.1.1 of the main text, varied in its force according to the circumstances and here it could not overcome the natural meaning of the clause or supply a sufficiently clear intention to displace the appropriate starting point.

## Chapter 7

*Partington v Rossiter* [2021] EWCA Civ 1564 is an interesting case involving several principles of interpretation considered in the main text. The testator's will stated that it had effect only in relation to his 'UK assets', the difficulty being that (both at the time of execution and the date of his death), the testator had substantial assets in Jersey (one of the Channel Islands). Neither statute nor the dictionary included the Channel Islands within the definition of the UK, but Lewison LJ held that a private instrument could in principle do so. The issue, then, was one of construction. He considered the 'golden rule', addressed at 7.3.1.1 of the main text, of the 'presumption against intestacy', holding that it applied to both full and partial intestacies. He did so on the basis of policy: that the court strives to give effect to the testator's intention and purpose in making a will, which will usually be to dispose of the testator's estate; that the intestacy rules are to some extent arbitrary; and that the testator's own dispositions promote legal certainty. The position of the rule or presumption may be therefore be more secure than we suggested in the main text.

Lewison LJ then went on to consider the admission of extrinsic evidence of the testator's intention under section 21(1)(c) of the Administration of Justice Act 1982, which we covered at 7.4.3.3 of the main text. As we explained, that subsection allows the admission of extrinsic evidence where the language used in the will is ambiguous in light of the surrounding circumstances. Lewison LJ held that the 'surrounding circumstances', in light of which the will can be considered ambiguous:

... include anything that would be relevant to the way in which a reasonable reader would understand the will (except evidence of subjective intention). Those circumstances include...the nature and location of assets which the testator had at the date when he executed the will; and (possibly) those which he had at the date of his death. They are objective facts known to the testator (and, at the date of execution of the will, the drafter of the will). (para. 37)

On the facts of the case, Lewison LJ agreed with the judge's conclusion that the will was ambiguous in light of the surrounding circumstances, since it was possible to include and exclude Jersey from 'UK', and it was unlikely that the testator wished to die partially intestate such that his objective intention must have been to deal with his Jersey assets. Extrinsic evidence was therefore admissible, and it showed beyond doubt that the testator had intended to include Jersey within the UK for these

purposes. He had explicitly asked for the will to be changed so that it read 'UK (inc Jersey)', but that had not been implemented before he died.

At 7.3.3.5 of the main text, it was noted that when the words 'nephew' or 'niece' are used in a will this *prima facie* means a nephew/niece by blood and not by marriage. This, however, is subject to the context of the will and evidence of the testator's intention. In *Wales v Dixon* [2020] EWHC 1979 (Ch), Master Teverson took into account *inter alia* the previous wills of the testator and his wife, the fact that the testator inherited all of his wife's estate and the continued contact with his wife's family after her death to hold that the phrase 'such all of my nephew's and niece's children' was intended to include relations by both affinity and consanguinity. The Master criticised the taking of the deceased's last will instructions by telephone.

## Chapter 8

We considered the forfeiture rule, and the possibility of its modification via the Forfeiture Act 1982, at 8.2.9 of the main text. At 8.2.9.1, it was noted that there was doubt as to whether the basic rule applied to cases of so-called 'motor manslaughter' and specific driving offences involving death. In *Amos v Mancini* [2020] EWHC 1063 (Ch), the claimant had been convicted of the offence causing the death by careless driving of her husband, who was in the car she was driving. While accepting that there was no direct authority on the point, Judge Jarman treated *Dunbar v Plant* [1998] Ch 412 as authority for the forfeiture rule applying to all cases of manslaughter, and saw no logical reason to distinguish 'inadvertent' manslaughter from the offence at issue. He nonetheless exercised his discretion under the 1982 Act to disapply the rule in its entirety in the circumstances of the tragic case.

In *Challen v Challen* [2020] EWHC 1330 (Ch), the 1982 Act was applied in the high-profile case of Sally Challen, who killed her husband Richard with a hammer while suffering from a psychiatric illness apparently caused by his coercive control of her. Mrs Challen was originally convicted of her husband's murder in 2011. If that conviction had stood, she could not have benefitted under the intestacy rules because the Act precludes modification where a person 'stands convicted' of murder (see 8.2.9.3 of the main text). But the Court of Appeal overturned her conviction in 2019 because of fresh post-conviction psychiatric evidence suggesting she had been suffering from previously undiagnosed personality disorders at the time of the killing (*R v Challen* [2019] EWCA Crim 916). Her guilty plea to manslaughter by reason of diminished responsibility was later accepted.

Because of the original application of the forfeiture rule, Mrs Challen's sons had inherited their father's estate instead of her. Mrs Challen did not want to recover the property from them for herself, but she did seek modification of the rule to allow her sons to recover the inheritance tax paid because their inheritance had come directly from their father rather than via her (see 1.2.2 of the main text). The sons supported their mother's claim. HMRC were invited to participate in the proceedings, but did not respond to the invitation.

The first issue to be decided related to the timing of the application. As discussed at 8.2.9.3 of the main text, section 2(3) of the 1982 Act requires an application to be brought within three months of the offender's 'conviction'. This could have caused

difficulties for Mrs Challen because she was originally convicted of murder and then pleaded guilty to manslaughter without a retrial. Judge Matthews sensibly decided that the relevant date of 'conviction' in this case was the date on which her manslaughter plea was accepted and she was sentenced. Her application could thus proceed.

In adjudicating on the substantive application, the judge engaged in a thorough review of previous cases (some of which are discussed at 8.2.9.3 of the main text). He emphasized that this was a deliberate killing to which the forfeiture rule still applied in the first instance, even if Mrs Challen's responsibility was impaired.

In exercising his discretion to modify the rule so that it did not have any effect, Judge Matthews took into account factors including the deceased's 'violent, humiliating and isolating conduct towards Mrs Challen, and his "gaslighting" her, by making her think that she was imagining his behaviour' (para. 66). Judge Matthews was also satisfied that the claimant loved the deceased very much, despite killing him. He emphasized that the facts occurred over 40 years and 'involved the combination of a submissive personality on whom coercive control worked, a man prepared to use that coercive control, a lack of friends or other sources of assistance, an enormous dependency upon him by the claimant, and significant psychiatric illness' (para. 70). It is noteworthy that he was significantly more willing to say that Ms Challen had been a victim of coercive control than the Court of Appeal had been in overturning the conviction.

A particularly important aspect of the case, according to Judge Matthews, was that Mr Challen 'undoubtedly contributed significantly to the circumstances in which he died', since the judge was satisfied that 'without his appalling behaviour over so many years, the claimant would not have killed him' (para. 70). This allowed Judge Matthews convincingly to distinguish the case from previous decisions involving diminished responsibility, such as *Chadwick v Collinson* [2014] EWHC 3055 (Ch), where relief was denied in circumstances where the deceased bore no responsibility for their own death.

Clearly, Judge Matthews responded very sensitively and carefully to the facts. He anxiously emphasized that his decision does not mean that *all* victims of coercive control who kill the perpetrators can expect a total disapplication of the forfeiture rule. The judge asserted that 'the facts of this terrible case are so extraordinary, with such a fatal combination of conditions and events, that [he] would not expect them easily to be replicated in any other' (para. 72). The expectation of relief may nevertheless be difficult to rein in in future cases.

Some may consider it controversial that the forfeiture rule can be modified at all in a case like Mrs Challen's. But the acceptance of her plea inherently demonstrates that her culpability was limited, and that was for reasons associated with the deceased's own conduct. The very point of the 1982 Act is to relieve the effects of forfeiture *notwithstanding* the fact that the deceased was unlawfully killed by the offender: if Mrs Challen had not been criminally responsible for her husband's death, the rule would never have applied in the first place. It is also worth emphasizing that Mrs Challen did not inherit in substance, and her motivation in improving her sons' position was largely selfless.

While the result appears correct, sadly the case of Sally Challen will not be the last occasion on which the phenomenon of coercive control and its consequences will come before the courts, however much Judge Matthews emphasized the extraordinary facts.

At 8.2.9.1 of the main text, reference is made to the apparently limited effect of section 33A of the Wills Act in the view of I. Williams, 'How Does the Common Law Forfeiture Rule Work?' in B. Häcker and C. Mitchell (eds), *Current Issues in Succession Law* (2016). B. Sloan, 'Forfeiture and the Effect the Wills Act 1837, s.33A' [2021] Conv 33 provides more detail on the matter. As explained at 8.2.9.2 of the main text, section 33A provides that where a person forfeits an interest under a will, the person is to be treated (subject to contrary intention) as having predeceased the testator. The difficulty, in the view of Dr Williams, is that section 33A is expressed to apply 'for the purposes of this Act'. On his analysis, because the Wills Act does not give general effect to wills, section 33A comes into operation only where section 33 (see 8.2.5.3 of the main text) is relevant. So if a testator leaves his residuary estate to his daughter, and the daughter kills the testator, sections 33 and 33A allow the daughter's children to inherit because section 33A treats her as having predeceased the testator. But, according to Williams' analysis, if the testator instead leaves his residuary estate to his spouse, and to a charity in the event that the spouse predeceases him, the intestacy rules would apply if the spouse killed the testator. The spouse did not literally predecease the testator and, on this view, because the substitutionary gift would not take effect *under the Wills Act* but (merely) under the will itself, the will cannot be read as if the spouse had predeceased even by virtue of section 33A.

In his 2021 article, the present author considers the policy difficulties with Dr Williams' conclusion (which Dr Williams accepts was not truly intended) and considers various possible solutions to the conundrum. One is to treat the phrase 'for the purposes of this Act' to mean 'for the purposes of the law of wills', so that section 33A simply causes the will to be read as if the forfeiting beneficiary has predeceased the testator. This interpretation of section 33A was implicitly accepted in *Henderson v Wilcox* [2015] EWHC 3469 (Ch) (referred to at 8.2.9.1 of the main text). Another solution (albeit not a comprehensive one) is to grant relief from forfeiture, the route taken in *Macmillan Cancer Support v Hayes* [2017] EWHC 3110 (Ch) (as discussed in 8.2.9.2 of the main text).

## Chapter 9

The 'decree nisi' of divorce, discussed at 9.2.1.1 of the main text, is now known as a 'conditional order' following the commencement of the Divorce, Dissolution and Separation Act 2020 in April 2022 (see the update to Chapter 2 above).

The family provision case of *Shapton v Seviour*, unreported, High Court, 6 April 2020 received considerable media coverage. It was a claim by an adult daughter against her father's estate, which his will left to her severely disabled step-mother. The need for maintenance pleaded by the claimant related was founded upon the 'need' for a larger house, the absence of other savings or assets, significant debts, and an alleged inability to afford holidays (which the Deputy Master described as 'at best disingenuous' (para. 16)). Deputy Master Lloyd rightly described the claim as 'absolutely hopeless' (para. 13) given that most of the small estate was tied up in the

widow's adapted home and she had very considerable needs. This was set against the applicant's 'comfortable' life (para. 17).

The case is much less significant than the (often misleading) media coverage suggested, and it seems regrettable that it even got to trial. It is nevertheless a useful reminder that, while estrangement may reduce or eliminate a claim by an adult child, an apparently positive relationship will not conversely produce a successful claim in the absence of a properly substantiated need for maintenance (see, e.g., 9.4.4.4 of the main text). In addition, the needs of an estate beneficiary may well have a fatal impact on a family provision claim (see, e.g., 9.4.3.3 of the main text).

*Re H* [2020] EWHC 1134 (Fam) was another claim by an adult daughter in relation to her father's estate. In one sense, it was closer to *Wellesley v Earl Cowley* [2019] EWHC 11 (Ch) than the leading case of *Ilott v The Blue Cross* [2017] UKSC 17 (both considered at 9.4.4.4 of the main text), since there was an estrangement *prima facie* attributable to the claimant. A complicating factor in *Re H*, however, was that the estrangement was largely caused by a psychiatric illness that the daughter in turn blamed on her family. Cohen J concluded that the claimant was in a position of 'real need' (para. 45) and that her father's will (excluding her) had not made reasonable financial provision for her. But the priority was held to be meeting the needs of the claimant's elderly mother, who was in poor health, and the judge felt unable to ignore the estrangement or the fact that the claimant had been notionally financially independent for some years (albeit dependent on benefits at the time of the judgment). He found that the claimant's priority was to recover her health, and that any award should focus on facilitating that and supporting her for the three-year period that would take before she could return to work. This was not held to be a case where the claimant should be set up with a home or income for life. An award of around £139,000 was made out of a net estate valued at £554,000. *Re H* is a further example of the highly fact-sensitive nature of cases under the 1975 Act.

## Chapter 10

We considered 'privileged wills', informal wills that can nevertheless be admitted to probate, at 10.1.1 of the main text. It would in principle have been possible to extend the 'privilege', currently applicable only to certain soldiers and seamen, to respond to the Coronavirus pandemic. That possibility was enthusiastically adopted by the campaigner Gina Miller, but there were a number of difficulties with the suggestion (see B. Rich, 'Honora Jenkins and her legacy — an update', <https://medium.com/@abarbararich/honora-jenkins-and-her-legacy-an-update-1f84eb00c49e>, 6 June 2020). For example, the precise circumstances in which any extended 'privilege' would have been available would have had to be precisely defined, and its wide application would significantly curtail the protection usually provided by the formality requirements. In response to a parliamentary written question (33619, asked on 23 March 2020), the Ministry of Justice asserted that the military contexts in which the current 'privilege' operates 'do not equate to the current civil circumstances'. Temporary reform therefore proceeded by facilitating electronic witnessing (see the update to Chapter 5 above).

The concept of a *donatio mortis causa* was considered at 10.2.2 of the main text. In *Davey v Bailey* [2021] EWHC 445 (Ch), Judge Jarman QC considered a claim that a

couple (Mr and Mrs Bailey) made substantial gifts in contemplation of their impending deaths. Three gifts were alleged: of an amount equivalent to the value of a butcher's shop, of half of the residue of the couple's joint estates, and of their joint home. In relation to the first two gifts, the claimants relied heavily on wishes recorded on a 'checklist for planning ahead' form issued by Macmillan Cancer Support when Mrs Bailey was discharged from hospital for the last time before her death from cancer. The claim failed in relation to those gifts, because the judge found that 'the intention of each of the couple was not to make gifts to take effect on the death of one or other of them' (a requirement discussed at 10.2.2.3 of the main text), 'but to express wishes which Mr Bailey would incorporate into a new will after the death of his wife', a process that Mr Bailey never completed before his own death ([2021] EWHC 445 (Ch), para. 29). In addition, the gifts were of a value or percentage of assets, and the wishes expressed on the form could not amount to delivery of dominion (see 10.2.2.4 of the main text) in that respect. The form was neither a title deed nor a document showing entitlement to possession of any of the assets. Another complication was that although Mrs Bailey was clearly contemplating her imminent death from cancer when she completed the form, there was no evidence that Mr Bailey was contemplating his own death for a specific reason (see 10.2.2.2 of the main text) before his wife passed away. In relation to the third alleged gift, said to have been made by Mr Bailey alone after Mrs Bailey died, the judge held that Mr Bailey was still not contemplating death from a heart attack (as eventually occurred) at that stage. Despite experiencing chest pains and being distraught at his wife's death, he reported himself to be in good health to his financial advisor a few months before he died. A final matter worthy of note is that Judge Jarman considered the debate over whether registered land could form the subject matter of a DMC (covered at 10.2.2.4 of the main text). While noting that 'it would certainly be odd if the requirements of deathbed gifts altered depending upon whether the property is registered or unregistered' (para. 48), the judge was clear that 'this interesting question deserves detailed consideration as and when a case depends on its resolution', which the case before him did not (para. 50).

Reacting to *Davey* on Twitter (<https://twitter.com/JulietCBrook/status/1366693413312204800?s=20>), Juliet Brook has pointed out that the Macmillan 'checklist' might well be the sort of document that could be given effect were a dispensing power to be introduced in England and Wales (see 5.3.2.1 of the main text). This may have allowed the would-be donors (and their apparently intended beneficiaries) to escape the strictures of the DMC doctrine, though the judge in *Davey* was anxious that the doctrine per se ought 'not to be used as a device to validate an ineffective will' ([2021] EWHC 445 (Ch), para. 36).

The doctrine of proprietary estoppel was expounded at 10.2.5 on the main text. With reference to *Davies v Davies* [2016] EWCA Civ 463, the debate over whether the remedy granted to a successful estoppel claimant ought to focus on satisfying the claimant's expectation or reversing their detriment was noted. The Supreme Court has considered the issue in *Guest v Guest* [2022] UKSC 27, which is now realistically the leading case on the estoppel remedy. The majority, led by Lord Briggs, expressed a qualified preference for an expectation-oriented approach.

The facts of *Guest* resembled those of several cases considered in the main text. For over 30 years, Andrew worked and lived on Tump Farm, owned by his parents, David and Josephine, for low wages. David promised Andrew (taking account of other

familial expectations) a sufficient share of the farm to enable him to run a viable farming business on the parents' deaths. The parents made wills accordingly. But following a falling out, Andrew was removed from the wills and left Tump Farm. Having decided that Andrew had successfully made out an estoppel claim against his still-living parents, the judge had awarded Andrew a lump sum of around £1.3 million before tax, comprising 50 per cent of the value of the farming business (to which he was already entitled via a partnership) and 40 per cent of the value of the farm itself, each after tax, subject to a life interest in the farmhouse for the parents. The Court of Appeal upheld the award, which was modelled on David's (revoked) will. The parents appealed to the Supreme Court on the question of remedy.

Lord Briggs (with whom Ladies Rose and Arden agreed) identified the objective of an estoppel remedy as compensating for the unconscionability caused by the defendant promisor in repudiating their representations. The preferable and simplest way of remedying that unconscionability was to assume (not *presume*) that claimants should have their expectations fulfilled. This was to be the 'starting point' in 'many cases', although 'considerations of practicality, justice between the parties and fairness to third parties may call for a reduced or different award' (para. 94). Lord Briggs grounded his approach in previous case law, identifying satisfying expectations as the 'main driver of the remedy' (para. 22). Following a detailed review, he concluded that 'there is not a single English authority favouring the approach that the essential aim of the remedy was to protect the claimant's reliance interest and therefore to compensate for the detriment' (para. 52), and he also criticised a detriment-oriented approach on principle.

If, however, the defendant could prove (the burden being on them at this stage) that satisfying the expectation would be out of all proportion to the detriment suffered, Lord Briggs held that the court might legitimately be constrained by the detriment. Disproportionality would affect the justice between the parties, justifying a departure from the starting point. For example, if someone with no expectation of an early death promised (without ensuring) that their carer would inherit their mansion, it would be unnecessary to award the carer the mansion if the promisor died only months later. But Lord Briggs cautioned that proportionality is 'no more nor less than a useful cross-check for potential injustice' (para. 72), expressing surprise that it was regarded as so central in *Jennings v Rice* [2002] EWCA Civ 159 (considered at 10.2.5.1 of the main text).

Simultaneously, Lord Briggs saw 'real merit' in a 'spectrum' between (at one end) 'bargain' cases where promise and required detriment are both well-defined and (at the other) cases where one or both are much less certain (para. 77). Lord Briggs thought bargain cases were 'likely to generate the strongest equitable reason' for full enforcement where the required detriment is fully performed, 'regardless of a disparity in value' between expectation and detriment (para. 77). On Lord Briggs' analysis, to suggest that the court faced a binary choice of satisfying expectations or reversing detriment was inimical to the flexible and pragmatic nature of the doctrine. He recognised the particular difficulty in finding an appropriate remedy for cases, like the present, where a promise regarding the future (such as on the death of the promisor) is repudiated before the expected performance date. But the need to abandon full entitlement in such a case did not justify a move straight to compensating detriment. Rather, Lord Briggs held that the solution may be a 'discount for acceleration of the

expectation' (para. 79). This would reduce Andrew's award in recognition of the fact that he would be receiving (part of) his promised inheritance before either parent had died.

On the facts, Lord Briggs held that *Guest* was a case at the end of the 'spectrum' giving Andrew a *prima facie* entitlement to fulfilment of expectation. Via acceleration, however, the judge's award impermissibly exceeded that expectation, and imposed on the parents the unjust prospect of selling the farm. Exercising the remedial discretion afresh, Lord Briggs distinctively concluded that David and Josephine should be allowed to choose the precise remedy. They could either give Andrew a reversionary interest in the farm, subject to life interests for themselves in the whole farm (not merely the farmhouse), or they could give an appropriately discounted payment to effect a clean break. The trust terms or the discount would be determined in the Chancery Division if not agreed.

The minority, led by Lord Leggatt, preferred a detriment-oriented approach, influenced by their apparent scepticism about proprietary estoppel as a cause of action (see 10.2.5.2 of the main text). Whatever one's opinion on the merits, Lord Briggs preserved equity's remedial generosity in the face of the requirements of a valid contract and the formality requirements for the disposition of estates (by will) and/or interests in land. The preference for an expectation-focused remedy may increase the likelihood that the estoppel doctrine will be used in substance to enforce an oral will (see 5.2.1 of the main text).