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Automatic Revocation of a Will on Marriage – A Rule that is past its Use-By Date?

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Since the implementation of the Wills Act 1837, there have been four ways to revoke a will. Three are set out in s 20 Wills Act 1837 (by making another will, by other writing executed in the same manner as a will, or by 'burning, tearing or otherwise destroying' the old will. The fourth means by which a will is revoked is set out in ss 18 and 18B Wills Act 1837, which provide for the automatic revocation of a will on the marriage or civil partnership of the testator (the marriage revocation rule). The only exceptions for this are if either:

(a) The will was made in expectation of the marriage / civil partnership to a particular person, or
(b) The marriage / civil partnership is merely a conversion from a civil partnership to a marriage or vice versa

Now that the Law Commission has re-started its Wills Project, attention is turning once more to the question of whether marriage should automatically revoke a will, especially now that, for many people, marriage 'no longer represents a significant lifestyle change'.[1] In their 2017 Consultation Paper, having noted the arguments for and against the rule, the Law Commission asked an open question as to whether the rule should be retained. The responses to the question indicate that, for many, the tendency was towards the 'if it ain't broke, don't fix it' mentality.[2]

Since then, there has been increased publicity on the damaging potential for this automatic revocation to provide motivation for a 'predatory marriage'.[3] As a consequence, the Law Commission's Supplemental Consultation Paper has re-visited this issue, asking for views on the prevalence of predatory marriage, as well as re-iterating the call for consultee's views on whether the rule that marriage or civil partnership revokes a will should be abolished.[4]

In order to answer this question, this article will outline the historical development of the rule. It will use the 1833 Fourth Report of the Real Property Commission ('Fourth Report'), which was the precursor to the Wills Act, to challenge the perception that the long-standing status of this rule is sufficient reason on its own for its retention. It will argue that the grounding of the rule in 19th Century property rights means that it should not be retained without thorough analysis of its merits from the modern perspective.

Origin of the Rule that Marriage Revokes a Will

At the time of the enactment of the Wills Act 1837, the status of a woman changed fundamentally on marriage. She became a feme covert, with her property becoming that of her husband. Following her marriage, she could only make a will of personalty if her husband consented to its terms,[5] and any will of land made by a feme covert was void by statute.[6] Due to the much reduced property ownership rights that came with the status of being a feme covert, it was not possible for a will made prior to her

[1] Law Commission, *Making a Will* (Law Com CP No 231, 2017) para 11.49
[2] Law Commission, *Making a Will: A Supplementary Consultation Paper* (Law Com CP No 260, 2023) para 3.15. 60% of consultees were in favour of retaining the rule, and only 20% in favour of its abolition.
[3] Dan Gilbert, "In a bind: the legal future of wills and weddings" (November 2022), https://www.lawsociety.org.uk/topics/private-client/in-a-bind-the-legal-future-of-wills-and-weddings
[4] Law Commission, *Making a Will: A Supplementary Consultation Paper* (Law Com CP No 260, 2023) para 3.49 - 3.50
[5] *Willock v Noble* (1874-75) L.R. 7 H.L. 580, 586-587
[6] W Holdsworth, *The Law of Succession* (Oxford, 1899) 70

marriage to continue as a valid will after the marriage,[7] and a woman's will was therefore revoked on marriage.[8]

However, for men at the time the situation was very different. Prior to the 1837 legislation, the various methods of revocation of a will were set out in the Statute of Frauds, and they differed according to the type of will.[9] A written will could be revoked orally, but only if that oral revocation was then committed to writing, read to the testator, and proved by three witnesses.[10] Wills of real property (the formalities for which were the precursor to the Wills Act 1837 formalities, so are much more suitable comparators with modern wills) could only be revoked by signed writing, made in the presence of three or four witnesses, or by another will (which also needed to be witnessed by three or four witnesses), or by burning or another act of destruction, either by the testator or in his presence and at his direction.[11] Each of these methods ensured that revocation of a will did not happen either accidentally or automatically; the testator needed to intend to revoke, and carry out a specific act to revoke. There was no automatic revocation on marriage.

However, notwithstanding the strictness of these requirements, the ecclesiastical courts were able to make a determination of an implied revocation, on the basis of a significant alteration in the testator's circumstances.[12] Interestingly, marriage alone was *not* a sufficient alteration in circumstances to cause revocation;[13] only when a man married *and* had a child would a presumption of intended revocation arise.[14] The principle was stated to have derived from the civil law, which 'destroys all wills by which any child is left unprovided for'.[15] The driving force behind the ability of the court to revoke a will was therefore to ensure that adequate provision was made for the testator's children; especially if the wife were to re-marry after the testator's death.[16] The presumption was also justified on the basis that the testator would have intended direct descendants to be the primary beneficiaries of his estate, over and above more remote family members.[17]

Whilst the pre-1837 case law acknowledged that this method of presumed revocation from the testator's actions contradicted 'the express words of the Statute of Frauds',[18] by 1771 it was a settled principle, that applied to wills of real property, as well as personal property.[19] However, as this revocation was by implication (based, it was suggested, on a tacit condition imposed by the testator at the time of making the will, that it should not take effect if his circumstances changed in this way[20]),

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[7] As it is rather bluntly put in Holdsworth, 'the wife, having no proprietary capacity, was held to have no testamentary capacity.' Some women did have property settled on them for their separate use.

[8] *Fourth Report made to His Majesty by the Commissioners appointed to inquire into the Law of England respecting Real Property* (House of Commons Sessional Papers, 1833) p 28 ('Fourth Report'); *Christopher v Christopher* (1771) Dickens 445, 449; *Doe v Staple* (1788) 2 Term Rep 684, 695

[9] Under the Statute of Frauds, there were different formalities for wills of realty and personalty, and nuncupative wills were still admissible for low value estates.

[10] Statute of Frauds 1677, s XXI

[11] Statute of Frauds 1677, s VI

[12] Fourth Report, pg 26

[13] *Doe v Barford* (1815) 4 Maule and Selwyn 10, 12

[14] *Lugg v Lugg* (1696) 2 Salkeld 592, 91 E.R. 497

[15] *Doe v Lancashire* (1792) 5 Term Rep 49, 55

[16] *Marston v Roe* (1838) 8 A and E 14, 61.

[17] *Sheath v York* (1813) 1 Vesey & Beames 390, 397; 35 E.R. 152, 154; see also *Christopher v Christopher* (1771) Dick 445, 449-450

[18] *Doe v Lancashire* (1792) 5 Term Rep 49, 63; 101 E.R. 28, 37 (Grose J)

[19] *Christopher v Christopher* (1771) Dick 445; Fourth Report, pg 28

[20] *Doe v Lancashire* (1792) 5 Term Rep 49, 58; 101 E.R. 28, 34

the presumption was open to rebuttal.[21] In particular, the court was swayed by whether provision was made for the wife and child(ren), either by the will itself, or by a separate settlement.[22] There were also exceptions; for example, marriage and birth of a child did not revoke a will of real property if there was a child from a former marriage, and the revocation would not benefit the child(ren) of the new marriage.[23] At a time when there was no family provision legislation, reviewing the evidence to determine whether the presumption was rebutted provided the courts with a means of considering whether the testator had adequately provided for his dependants, with the focus throughout on provision for both the child(ren) and wife. Indeed, in one case it was stated that 'the children of the marriage must be provided for in order to prevent the revocation of the will.'[24]

Although some of the judiciary railed against the rule,[25] others appreciated the flexibility it afforded:

> It would be dangerous to insist, that the marriage simply revokes a will. Upon the other hand, it would be as dangerous to say, that no alteration of circumstances shall operate as an indication of intention to revoke. If such a case was to come before me upon a legal interest, I should put it into a proper way to be determined.[26]

Unfortunately, such flexibility often causes problems, and the eighteenth and early nineteenth century case law reveals the numerous areas for debate. For example, did the presumption apply if the child was born posthumously, resulting in the revocation taking effect after the testator's death?[27] What should be the effect of the testator's child dying after the testator, but whilst still in infancy?[28] Was oral evidence of the testator's contrary intention sufficient?[29] The case law that shows that a substantial amount of court time was spent discussing individual circumstances to determine whether the facts supported the implied revocation, or whether there was sufficient evidence to rebut the presumption, causing uncertainty both for the beneficiaries of the prior will, and the surviving wife and child(ren).

Fourth Report of the Real Property Commission

The pre-curser to the Wills Act 1837 was the 1833 Fourth Report of the Real Property Commission ('Fourth Report'), the aim of which was to reduce 'the dangers of error and litigation' by making the rules regarding wills 'simple and uniform'.[30] The Fourth Report did not consider women's property

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[21] *Brady v Cubitt* (1778) 1 Douglas 31; 99 E.R. 24, 28.
[22] *Jackson v Hurlock* (1764) Ambler 487; 27 E.R. 318; *Lord Ilchester's Case* (1803) 3 Ves Jr 348
[23] *Sheath v York* (1813) 1 Vesey & Beames 390, 398; 35 E.R. 152, 154. Under the intestacy rules for real property, a daughter born to a second wife would not be able to inherit if there was a son from the former marriage. Thus, revoking the will would not alter the daughter's (lack of) inheritance.
[24] *Marston v Roe* (1838) 8 A and E 14, 62. This case was heard after the Wills Act 1837 had come into force, but concerning a marriage made before that time.
[25] *Doe v Lancashire* (1792) 5 Term Rep 49, 101 E.R. 28, 33 (Lord Kenyon, Ch J): 'It was with much hesitation that any rule on this head was borrowed by our predecessors from the civil law and incorporated into our law.'
[26] *Jackson v Hurlock* (1764) Ambler 487; 27 E.R. 318, 321
[27] *Doe v Lancashire* 5 Term Rep 49
[28] *Emerson v Boville* (1802) 1 Phillimore 342
[29] *Brady v Cubitt* (1778) 1 Douglas 31. As there were different requirements for wills of real and personal property at the time, the courts were more willing to admit oral evidence to rebut the presumption of revocation for a will that only dealt with personal property. The admission of parol evidence in relation to wills of real property was still being debated at the time of the Fourth Report (Fourth Report, pg 29); in *Marston v Roe* (1838) 8 A and E 14, parole evidence was rejected because this was contrary to the requirements of the Statute of Frauds.
[30] Fourth Report, pg 4

rights,[31] so the report concluded that there was to be no change made to a married woman's (in)ability to make a will,[32] or to the rule that the marriage of a woman revoked her will.[33]

However, the implied revocation rule received close scrutiny, with it being noted that the 'numerous exceptions which have been made to the rule… and the variety of doubts and consequent litigation which have arisen from it, prove that it is attended with considerable inconvenience.'[34] There was a particular concern about the difficulties of purchasing land from someone who had inherited it by will, when the validity of that will could be questioned.[35] The implied revocation principle was therefore in need of reform.

The Report recognised that hardship could be caused both by revoking a will, and by it remaining unaltered, noting that '[i]n many cases, intestacy is equally prejudicial'.[36] It also mentioned the possibility of extending the rule, either to include marriage without the birth of a child, or to include the birth of a child without any new marriage.[37] However, the conclusion was that 'no will ought to be set aside on conjectures respecting what the testator's intentions may have been in consequence of a change in circumstances.'[38] It was also asserted that, as the potential for implied revocation was well known, 'no one neglects to cancel or alter his will'.[39] As ownership of real property was much less widespread at the time, it is likely that those who did own substantial estates would have been aware of the need to make a will whenever their circumstances changed.[40] The conclusion of the Commissioners was clear:

> The numerous exceptions which have been admitted, prove that there are many cases in which it is expedient that, notwithstanding the marriage and birth of a child, the will should remain unrevoked; and there are probably cases, not within any of the exceptions, in which proper and equitable wills have been revoked by the present law, contrary to the intention of the testators. We believe that the inconveniences of the rule preponderate over its advantages, and we therefore recommend that it should be abolished.[41]

Thus, the Fourth Report recommended that the means by which a will could be revoked should be limited to three: making a new will, signed writing executed in the same manner as a will, or by destruction. Only a woman's will would be revoked on marriage, an outcome that was constrained by women's property rights. This stance was reflected in first draft Bill that was presented to parliament in 1835, which stated that every will made by a woman would be revoked on marriage,[42] and that

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[31] This situation continued until the passing of the Married Women's Property Acts of 1870 and 1882.
[32] Fourth Report, pg 23; Wills Act 1837, s 8
[33] Fourth Report, pg 32
[34] ibid
[35] ibid
[36] ibid
[37] The case of *Doe v Barford* (1815) 4 Maule and Selwyn 10 was cited, in which a testator who had been married for some time made a will leaving his property to his niece. At the time of the testator's death, his wife was pregnant and the posthumous child was left unprovided for.
[38] Fourth Report, page 32
[39] ibid
[40] In HC Deb 12 April 1836, vol 32, col 905 it was suggested that in 99 cases out of 100, real property was disposed of by settlement or will; in HC Deb 28 June 1876, vol 230 col 582, it was suggested that the intestacy laws for real property took effect 'upon many small properties belonging to persons in humble circles'.
[41] Fourth Report, page 32
[42] Bill for the Amendment of Laws with Respect to Wills, 4th March 1835, s 28

'[n]o Will made by a Man shall be revoked by his Marriage and the birth of a Child or Children, or by any presumption of intention on the ground of an alteration in his circumstances.'[43]

Passage of the Wills Act Through Parliament

On 11th March 1835, this Bill was presented for its second reading. Despite this not being the forum for close scrutiny of the terms of the Bill, the Attorney General Sir Frederick Pollock is recorded as having stated that 'he did not understand at all why a female's will should be revoked by her marriage, and a man's not, as was proposed'.[44] Given the unequal status of women at the time, it seems strange that this is expressed as a matter of incomprehension, yet he went on to suggest 'the propriety of making marriage alone a revocation of a will, and so with respect to a birth, for it never could be the intention of any one that children begotten after the making of a will should have been intended to be disinherited.'[45] Mr Cutlar Ferguson is recorded as having made the following statement in response:

> [W]ith regard to the revocation of a will, he was of opinion that it ought not to be presumed that a man intended to do what he had not done. He thought, therefore, that marriage and the birth of a child ought not to be held to be a revocation of a will in the case of a man: when a lady married, matters differed, as she then had no will of her own.[46]

After this second reading, the Bill went to consideration by Select Committee, membership of which included 'all the most eminent members of the English and Irish bar'.[47] No record remains of the Select Committee meetings, but by 18th March 1835 the draft Bill had been amended, with section 24 now reading:

> And be it further Enacted, That every Will made by a Man or Woman shall be revoked by his or her marriage, except a Will made in exercise of a power of appointment, when some Person other than his or her heir, executor or administrator, shall be entitled to the Real or Personal Estate thereby appointed in default of such appointment.

Section 25 then confirmed the abolition of the principle of revocation by presumed intention. The substance of two sections became sections 18 and 19 of the Wills Act 1837, respectively.

Although it is impossible to tell for certain what occurred in the Select Committee, the Hansard records of debates in the House of Commons and House of Lords suggest that the main driver behind the alteration was the desire to achieve simplicity and clarity in the law on wills, with all people and property subject to the same uniform laws.[48] The logic would appear to be thus:

1. All wills should be revoked by the same means for all people.
2. Discretionary methods of revocation should be abolished.
3. Marriage should either always revoke a will, or never revoke a will.
4. A woman's will must always be revoked on her marriage,

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[43] Bill for the Amendment of Laws with Respect to Wills, 4th March 1835, s 29
[44] HC Deb 11th March 1835, vol 26, col 854
[45] ibid, col 855
[46] Ibid, col 859
[47] HC Deb 4th December 1837, vol 39, col 532 (Sir James Campbell, AG)
[48] In the 1835 House of Commons debate, Mr O'Connell emphasised that the intention of the Bill was 'to do away with anomalies and with fictions'; (HC Deb 11th March 1835, vol 26, col 857). Dr Lushington added that revocation should not be left 'to the discretion of Judges to decide in directly different ways.' (HC Deb 11th March 1835, vol 26, col 858)

5. Therefore a man's will should always be revoked on his marriage.

The best indication of the reason behind the introduction of the marriage revocation rule can be found in a Commons debate of December 1837 (when there had been a call for implementation of the new Wills Act to be postponed for three months to allow for greater parliamentary scrutiny). Sir James Campbell, the Attorney General, declared that 'A marriage ought either not to revoke a will under any circumstances, or it ought in all cases to invalidate it. It was indispensably necessary to lay down a rule, and the Legislature had accordingly declared that a marriage in all cases should make a will previously executed void.'[49]

However, the logical sequence set out above is governed by the different property rights that existed between men and women at the time; if you remove those, then the recommendation of the Fourth Report (that marriage should never revoke a will) would have been an equally suitable conclusion. The rule that marriage automatically revokes a will was therefore a result of the desire for simplicity and uniformity for testators, despite being contrary to the proposals put forward in the Fourth Report. Unfortunately, the debates show no clear argument in support of the rule beyond its simplicity, even though the Fourth Report had concluded that the inconveniences of automatic revocation of a will outweighed the advantages.

As an interesting aside, nearly 200 years after the abolition of the implied revocation rule, the recent case of *Lattimer v Karamanoli*[50] has raised the prospect of the testator's actual intentions being, once again, open for consideration by the court. The exception to the automatic revocation rule requires it to be apparent from the will that the testator did not intend the will to be revoked by an impending marriage.[51] In *Lattimer,* the deceased had made a will only one day before their marriage, but the will contained no express reference to it being made in contemplation of their marriage, so the exception could not apply. Master Clark noted that it was 'implausible' that the testator would go through the 'pointless and farcical' exercise of making a will that she knew would be revoked on her marriage the following day.[52]

In a bid to escape the strictures of s 18, an argument was made for rectification of the will (under s 20 Administration of Justice Act 1982) to include a statement that it was made in anticipation of impending marriage. Such a claim for rectification can consider extrinsic evidence of the testator's intention.[53] This was only a claim for summary judgment, and it is not yet known whether this will proceed to a full trial. However, consideration of extrinsic evidence from the time of execution of the will could pave the way to a more nuanced approach to revocation of a will by marriage, which would start to erode the certainty that was so prized in the 1830s.

Consequences of the Rule that Marriage Revokes a Will

The automatic revocation of a will on marriage means that, unless the testator makes a new will after marriage, they will die intestate. Automatic revocation was therefore only ever an attractive proposition if the intestacy laws provided sufficient provision for the deceased's new family. At the time of the enactment of the Wills Act 1837, the intestacy provisions differed for real and personal property. Real property passed to the deceased's heir; if there were children then this would be the

[49] HC Deb 4th December 1837, vol 39, col 536-537
[50] [2023] EWHC 1524 (Ch)
[51] Wills Act 1837, ss 18(4) and 18B(4)
[52] [2023] EWHC 1524 (Ch) [70]
[53] Ibid [62]

oldest male child.[54] Personalty was distributed between the wife and children, with all children being treated equally.[55] The provision for widows on intestacy was by the right of dower, which entitled them to a third of their husband's estate.[56] Although this was subject to contrary intention by will, or by deed,[57] there would usually be no such contrary intention in the event of a man who died intestate. Thus the intestacy rules and rights of dower provided children and widows with some financial protection in the absence of a will, although the inheritance rights of daughters, and younger sons, was limited to the deceased's personalty.

The implementation of the Wills Act 1837 had the effect of focusing the attention on the act of marriage, as opposed to the conjunction of marriage and birth of a child; it was the act of marriage alone that should trigger the re-thinking of one's testamentary provisions. The civil law origins of the rule, that considered provision for children to be the priority, were lost and replaced by a narrative of expectation in favour of the spouse. Since that time, the intestacy rules have increasingly favoured the spouse. First of all, the Intestates' Estates Act 1890 entitled widows to the entirety of an estate worth no more than £500, and a charge over any estates exceeding that amount to secure the sum of £500.[58] The current intestacy provisions, first introduced by the Administration of Estates Act 1925, are extremely favourable to spouses and civil partners. The entitlement of the personal chattels, a fixed net sum of £322,000, plus half the remainder[59] ensures that spouses will be well provided for and, in many cases, receive the entirety of the deceased's estate.

Thus, in the nearly 200 years since the Wills Act 1837 was enacted, we have moved from a position where the (male) children were primary heirs, with rights of dower ensuring that a widow was not left penniless, to one where the surviving spouse / civil partner will receive the majority of the estate. It is this current position, coupled with the automatic revocation rule, that can provide the financial incentive to marry or enter into a civil partnership.[60]

If the automatic revocation rule were to be removed, there would be three possible scenarios after an individual's marriage:

1. The individual makes a new valid will, after the marriage, that reflects their current family status
2. The individual does not make a new will so that, at the time of their death, their only valid will is one made prior to the marriage. This may, or may not, benefit their spouse.
3. The individual has never made a will, so dies intestate.

Situation 1 is not worthy of further comment, as this is the ideal situation for all concerned. In situation 3, the spouse / civil partner would be entitled to the majority of the estate under the intestacy rules.

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[54] Roger Kerridge, 'Intestate Succession in England and Wales' in Kenneth Reid et al (eds), *Comparative Succession Law Volume II: Intestate Succession* (OUP 2015) 325-326; Inheritance Act 1833, ss 6 and 7.
[55] ibid, 326
[56] H W Holdsworth, *The Law of Succession* (Oxford, 1899) 121; both the husband's legal and equitable estate was available to provide for dower (Dower Act 1833, s 2). Dower only applied to widows; if a woman died intestate then any real property that she owned would pass to her heirs, and her widower would be entitled to a life interest; W Holdsworth, *The Law of Succession* (Oxford, 1899) 116.
[57] Dower Act 1833, ss 6 and 7
[58] Intestates' Estates Act 1890, ss 1 and 2
[59] Administration of Estates Act 1925, s 46(1). The fixed net sum was increased to £322,000 on 26th July 2023
[60] Law Commission, *Making a Will: A Supplementary Consultation Paper* (Law Com CP No 260, 2023) para 3.29

This may disappoint other relatives, but if an individual has never made a will then the intestacy rules must apply. As the Fourth Report noted in 1833, 'the law cannot supply the want of a will.'[61]

It is therefore only the second circumstance in which the surviving spouse could be prejudiced, depending on the terms of the will. (Couples who have cohabited for a period of time prior to marriage may have made wills that benefit each other prior to the marriage.) However, unlike the situation in the nineteenth century, a spouse now has the ability to bring a claim under the Inheritance (Provision for Family and Dependants) Act 1975 for 'reasonable financial provision' from the estate. Such a claim would be assessed using the higher, spousal standard of the provision that would be reasonable in all of the circumstances, 'whether or not that provision is required for his or her maintenance',[62] which will be assessed using the imaginary divorce guideline.[63] Any widow(er) who was not adequately provided for because their spouse / civil partner had not made a new will after marriage would have a strong claim under the 1975 Act, and the courts have proven themselves to be astute to the needs of a such a claimant.[64]

Furthermore, the 1975 Act entitles the court to consider the duration of marriage, and any other relevant information,[65] which enables the court to match the size of the award to particular facts of the case. Whilst it is not desirable for any widow(er) to have to bring a claim under the 1975 Act, it provides a greater ability for the court to adjust the award to the nuances of the situation than there can ever be under the intestacy rules.

Conclusions

This article has shown that s 18 Wills Act 1837 was not what had been proposed by the Fourth Report, and instead appears to be the result of the interaction of archaic nineteenth century women's property rights with the desire for simplicity and consistency. Given the laws of property ownership at the time, automatic revocation when anyone married was the only way to achieve these aims. However, the warnings sounded by the Fourth Report in 1833 hold true: automatic revocation of a will on marriage can lead to an individual's property being distributed in a way that directly contradicts their expressed wishes.

It is therefore time to re-examine the soundness of this rule from a twenty-first century standpoint, without the blinkers of nineteenth century property law holding us back from reform. As the Law Commission have noted in their Supplemental Consultation Paper, the current conjunction of automatic revocation, the intestacy rules, and the 1975 Act provides 'double protection to surviving spouses and civil partners'.[66] Back in 1833, the Fourth Report recommended that marriage of a man should *not* revoke their will. Is it now time to implement this recommendation for both men and women?

[61] Fourth Report, pg 32
[62] Inheritance (Provision for Family and Dependants) Act 1975, s 1(2)
[63] Inheritance (Provision for Family and Dependants) Act 1975, s 3(2)
[64] *Kaur v Singh* [2023] EWHC 304 (Fam)
[65] Inheritance (Provision for Family and Dependants) Act 1975, s 3
[66] Law Commission, *Making a Will: A Supplementary Consultation Paper* (Law Com CP No 260, 2023) para 3.45