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Supported Will-Making

A Socio-Legal Study of Experiences, Values, and Potential in Supporting Testamentary Capacity

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EXECUTIVE SUMMARY

This report was prepared to inform the review of the law of wills being conducted by the Law Commission of England and Wales. It is an empirically grounded, socio-legal inquiry into the potential for, and challenges involved in, supported will-making. The report is founded on the Everyday Decisions project[1] and a follow-up study which explored intellectually disabled people's views about, and experiences of, will-making in more depth. Our research explored how supported will-making works in practice and areas where legal reform, practical changes and shifts in professional attitudes are needed to secure effective levels of support for disabled people.

Our main legal focus has been on how supported will-making would intersect with and supplement existing legal frameworks like testamentary capacity, mental capacity, statutory wills, and intestacy as well as international approaches to supported decision-making following the UN Convention on the Rights of Persons with Disabilities (CRPD). We found that, internationally, supported decision-making frameworks are becoming increasingly prevalent, and generally operate to formalise existing informal support practice. However, in alignment with our findings in the original Everyday Decisions project (Harding & Taşcıoğlu, 2017, 2018), existing supported decision-making practice is focused on everyday decisions rather than more complex life choices. Overall, we found that while pockets of good practice do exist, there is tendency under the current Mental Capacity Act 2005 (MCA) framework to fall back on best interests decisions, rather than to support people to make their own decisions.

Findings from the Everyday Decisions project revealed that only a small number of care and support professionals had direct experience of supporting their clients to make a will. There was a general lack of knowledge and understanding of wills by frontline care staff who took part in this research. These care professionals often thought that supporting clients with will-making was beyond their competence and identified family members, lawyers and financial deputies as persons responsible for supporting intellectually disabled persons with will-making. There was, further, some evidence of confusion in the approach that care professionals (with appropriate responsibilities to do so) took to assessing testamentary capacity. Overall, we found that wills and will-making were not well understood by care and support professionals. We consider that there is a training need in this area within the care sector.

The experiences of intellectually disabled people with will-making were at the heart of this project. In the report, we introduce key socio-legal issues in will-making by people with intellectual disabilities through two case studies, Penny and Gareth, who have both been supported to make a will. Through this empirical research, we found a gap in access to

[1] See further, www.legalcapacity.org.uk

appropriate support to make a will for intellectually disabled people of modest means, particularly for those whose relationships and networks mean that the intestacy rules do not fit with their wishes and testamentary preferences.

Penny's experience highlights the need to review wills regularly to account for changes in circumstances. Her story also highlights a theme, found across these data, that disability sometimes interrupts normative patterns of succession, with a preference for leaving greater provision to disabled children. This disability difference sometimes creates discord between family members. Penny's story further highlights the need for support from a range of different sources, including legal professionals, family members and advocates to allow disabled individuals to navigate this complex area of law and social relationships, and to have access to a broad range of information.

The importance of appropriate safeguards when making a will cannot be underestimated. Through Gareth's story we emphasise the need for appropriate and effective safeguards to protect vulnerable testators from abuse. This has proven especially challenging for testators who do not have good relationships with their families. We found that safeguarding and ensuring the right to legal capacity is a major challenge for developing CRPD compliant supported decision-making frameworks. Gareth's story also draws attention to the importance of accessible information in helping disabled people to protect themselves from financial abuse, manipulation or coercion, and the need for solicitors to be able to communicate with disabled people. Gareth's story highlights the failings of the current law in this regard, and offers an important rationale for change.

Additional analysis of the empirical data from the projects provides three guiding concepts for the reform on the law of wills and supported will-making. These are: trust, communication and accessible information. We found that enabling disabled people to be supported by someone that they know and trust holds the key to ensuring that a will reflects their testamentary wishes. We recognise, however, that it is also important to ensure vulnerable testators have sufficient protection from abuse of their trust through non-discriminatory safeguards. Effective communication between all parties is vital to supporting intellectually disabled people to make a will. Failures in communication can lead to inappropriate outcomes, and potentially open up opportunities for abuse of trust. Accessible information is also key to ensuring that intellectually disabled people can make a will that accurately reflects their wishes and preferences, and we recommend the introduction of an Accessible Information Standard for legal services.

In the final part of the report, we evaluate potential policy options for reform to better support will-making by intellectually disabled people, balancing possible options with the safeguards that would be required. We discuss the potential for reform through amendment of the Mental Capacity Act 2005 Code of Practice, the potential of different approaches to a 'bespoke' Supported Will-Making Scheme, and the difference that a formal nominated supporter scheme (our preferred option) could make in this area.

KEY FINDINGS

1. Internationally, supported decision-making is becoming increasingly common.
2. Nominated supporter schemes are being used in a range of jurisdictions around the world to provide better support to intellectually disabled people.
3. There is a gap between the intestacy rules and (expensive) statutory wills in access to appropriate support for making a will in England and Wales.
4. The relationship between the common law test for testamentary capacity and the Mental Capacity Act 2005 principles is legally unclear.
5. Disability can make a difference to usual patterns of inheritance.
6. Frontline care and support professionals have limited awareness of how to make a will and do not feel confident supporting service users in this area.
7. Intellectually disabled people would like to be supported to make a will that reflects their wishes and preferences.
8. Intellectually disabled people said that solicitors were not always good at communicating information about wills in accessible ways.
9. Intellectually disabled people rely heavily on trusted relationships for support.
10. Intellectually disabled people would like more easyread and accessible information to help them access legal services.
11. Appropriate and effective safeguards are required to protect intellectually disabled people from financial abuse.

RECOMMENDATIONS FOR REFORM

1. Substantive updating of the Mental Capacity Act 2005 Code of Practice is needed to include more examples of how to support decision-making in general, and supporting will-making in particular.
2. Clarification of how the Mental Capacity Act 2005 principles (especially principles 1, 2 and 3), interact with conflicting approaches in common law capacity tests is required.
3. Training for frontline care staff and statutory advocates on the importance and practicalities of will-making is required to better support testamentary choices.
4. Training for legal professionals who provide will-making services (including solicitors, legal executives and will-writers) on effective communication with people with intellectual and sensory disabilities is needed to ensure legal services are accessible.
5. Clear, non-discriminatory, appropriate and effective legal safeguards against abuse are needed to protect vulnerable testators.
6. The introduction of an Accessible Information Standard for Legal Services would be extremely helpful in increasing the accessibility of legal services.
7. The creation of a formal nominated supporter scheme, with supervision from a public body, is likely to be the best way to balance choice, support and safeguards.

CHAPTER 1. INTRODUCTION

This report was prepared to inform the review of the law of wills being conducted by the Law Commission of England and Wales (Law Commission, 2017a). It is an empirically grounded, socio-legal inquiry into the potential for and challenges to supported will-making. The report is founded on the Everyday Decisions Project and a follow-up study which explored intellectually disabled people's views about and experiences of will-making. Our research interrogated how supported will-making currently works in practice and areas where legal reform, policy changes and shifts in professional attitudes are needed to secure effective levels of support for disabled people.

Wills are extremely important, and very common, legal tools, which allow people to express their choices about what will happen after their death. In England and Wales, wills are grounded in a commitment to testamentary freedom, which means that the person making a will can choose who they would like to leave their property to. The only constraints on testamentary freedom are found in the Inheritance (Provision for Family and Dependants) Act 1975, which sets out particular limited entitlements for specified family members and dependants to inherit. If a person does not make a will, they die intestate, and their property will be distributed according to the rules of intestate succession.[2] Where a person dies intestate it can be more difficult, time-consuming and expensive for their family to wind up their estate.

The most common use for a will is to set out wishes and choices about the distribution of assets and property. There are, however, other very important functions of wills, including: appointing executors (the people responsible for carrying out the instructions in the will); nominating legal guardians for children under the age of 18, or for family pets; and making clear wishes and preferences about cremation and/or burial. As social media profiles and digital assets become more prevalent, and contain increasing amounts of personal data, choices about whether these should be archived, memorialised or deleted have also become increasingly important.

Will-making by and for intellectually disabled people is not an area which has received a great deal of attention in legal research (Harding, 2015). Yet wills are important everyday legal decisions, which many people with a range of intellectual disabilities should be able to make with appropriate support. We have approached this project on the basis that we view will-making as important, relatively straightforward, and a positive thing for most people to do. Whilst estimates suggest that many people do not make a will, or put off making wills until they are older (Macmillan Cancer Support, 2018), this does not, in our view, detract from the general importance of making a will.

[2] Administration of Estates Act 1925, s46.

In this first chapter of the report, we set out the methodology used in this research, including information about research ethics, data analysis and participant demographics, before going on to provide a brief justification for and definition of a number of key terms we use in this report. We conclude this first chapter with an overview of the remainder of the report.

1.1 METHODOLOGY

This report is grounded in qualitative, empirical, socio-legal research from the Everyday Decisions[3] project, and a bespoke follow-up study on supported will-making.[4] The Everyday Decisions project involved semi-structured in-depth interviews with intellectually disabled people and with social care professionals who have experience of working with and supporting people with disabilities. Across England and Wales, a total of 46 participants took part in the Everyday Decisions research: 15 disabled people who were supported by 6 supporters, and 25 care professionals. All interviews were audio recorded with the consent of participants.

Table 1.1: Demographic Information – Care Professionals

Age		**Gender**	
18-24	16% (n=4)	Male	12% (n=3)
25-34	4% (n=1)	Female	88% (n=22)
35-44	24% (n=6)	**Race/ethnicity**	
45-54	32% (n=8)	Black African	4% (n=1)
55-64	16% (n=4)	Black Caribbean	4% (n=1)
65-74	8% (n=2)	Mixed (White/Black Caribbean)	12% (n=3)
Highest Qualification		White British	80% (n=20)
Unknown	8% (n=2)	**Occupation**	
NVQ Level 2	4% (n=1)	Housekeeping	8% (n=2)
NVQ Level 3	24% (n=6)	Frontline Care Worker	20% (n=5)
NVQ Level 4	4% (n=1)	Team Leader/Co-ordinator	12% (n=3)
NVQ Level 5	12% (n=3)	Care Manager/Deputy Manager	16% (n=4)
Professional qualifications	4% (n=1)	Brain Injury Case Manager	32% (n=8)
Degree (undergraduate)	16% (n=4)	Mental Capacity Assessor	8% (n=2)
Higher Degree	32% (n=8)	Best Interests Assessor	4% (n=1)

[3] Funded by the British Academy, Grant number MD150026.

[4] Funded by the ESRC University of Birmingham Impact Accelerator Account, Urgency Fund.

The supported will-making study involved follow-up interviews, focused particularly on making a will with 6 intellectually disabled people, one of whom was helped by a supporter. Two of the intellectually disabled participants and one supporter took part in both the Everyday Decisions research and the follow-up study. The total dataset therefore includes the perspectives of 50 participants: 25 care professionals, 19 intellectually disabled people, and 6 supporters. Demographic information relating to the participants can be found in Table 1.1 (Care Professionals) and Table 1.2 (Intellectually Disabled Participants).

Further analysis of demographic information can be found in the Everyday Decisions project report (Harding & Taşcıoğlu, 2017). Data saturation was reached in both projects, despite the relatively low number of participants in the follow-up study. Two of the participants in the follow-up study, both of whom were aged over 60 had made a will. We discuss their stories in detail in Chapter 4. Participants were recruited primarily through gatekeeper organisations, supplemented by strategic opportunistic sampling and snowball sampling. Recruitment to the follow-up study was hampered by a relative lack of knowledge and understanding about wills and will-making in the target population.

Table 1.2: Demographic Information – Intellectually Disabled Participants			
Age Group		**Gender**	
18-24	5% (n=1)	Male	37% (n=7)
25-34	21% (n=4)	Female	63% (n=12)
35-44	21% (n=4)	**Disability**	
45-54	21% (n=4)	Learning difficulty	79% (n=15)
55-64	21% (n=4)	Sensory impairment	21% (n=4)
65-74	11% (n=2)	Physical impairment	47% (n=9)
Relationship Status		Acquired Brain Injury	11% (n=2)
Single	37% (n=7)	Autism Spectrum Disorder	11% (n=2)
Casual Relationship	21% (n=4)	**Supported at Interview**	
Engaged	26% (n=5)	Supporter present	63% (n=12)
Divorced	11% (n=2)	No Supporter	37% (n=7)
Widow	5% (n=1)		

1.1.1 RESEARCH ETHICS

Both projects received ethical approval from the University of Birmingham Humanities and Social Sciences Ethical Review Committee. All participants had the capacity to consent to participate in the research. Accessible participant information sheets and consent forms were used to facilitate understanding by and informed consent from disabled participants.

Some participants had visual impairments or difficulty reading, and were provided with large print information and consent forms. Process consent, through detailed discussion of the participant information sheet and consent form, was also used to support participation by intellectually disabled people with limited literacy.

1.1.2 DATA ANALYSIS

These data were analysed thematically, using a range of deductive (researcher driven)[5] and inductive (data driven) codes. Thematic analysis offers a flexible mechanism for approaching qualitative data, which is not grounded in a particular theoretical approach (Braun & Clarke, 2006). For the purposes of this report, data from both studies were combined into a single dataset, and independently read for themes relating to wills by the researchers. In addition to the deductive themes, inductive themes that arose from the data related to accessibility, advocacy, communication, training and trust. These themes are discussed in Chapter 4 of this report, where we explore current practice in supporting intellectually disabled people to make their will, and the possibilities and challenges contemporary practice, and disabled people's views, pose for law reform.

1.2 LANGUAGE AND DEFINITIONS

Throughout this report we refer to 'intellectually disabled people'. This definition seeks to take an inclusive approach to disability, and is grounded in the 'social model' of disability (Clough, 2015; Scullion, 2010). In line with social model approaches, this term seeks to highlight that people are disabled by the society in which they live, rather than by their individual impairments. In the context of this research, this translates into a commitment to finding ways to support intellectually disabled people to exercise their rights to enjoy legal capacity.

Our focus on intellectual disability in this report is driven by the participants in this research, and we use the term intellectual disability to include a wide range of impairments, including learning disabilities, autism spectrum disorders, acquired brain injuries and neurodegenerative diseases.

Like the Law Commission (2017a), we use the term 'testator' to refer to both men and women making a will. We sometimes use the term 'vulnerable testator' to draw attention to people who might be at greater risk of abuse as a result of their impairments, their circumstances, or their relationships. In using the term 'vulnerable' we are mindful of the feminist academic literature on vulnerability theory (Fineman, 2008, 2010, 2012; Mackenzie & Rogers, 2013; Mackenzie, Rogers, & Dodds, 2014), though we do not use 'vulnerable' in

[5] Deductive codes were death/dying, inherit/inheritance, will/wills, legal advice, solicitors, support.

this report as a theoretical term of art. Rather, we use the term 'vulnerable' to highlight situations where there is a heightened need for responsiveness to the risk of abuse.

1.3 OVERVIEW OF THE REPORT

In Chapter 2, we outline the current approach to supported decision-making in the three jurisdictions of the United Kingdom, before moving on to provide an overview of some international alternative approaches to supported decision-making which could provide valuable lessons to help shape law reform in England and Wales.

Chapter 3 explores legal issues in supported will-making, providing an overview of how supported decision-making does and could intersect with the current law on testamentary capacity, statutory wills and intestacy. We also highlight the limitations of the current approach to challenging wills made by vulnerable testators on the basis of knowledge and approval, undue influence, fraud and mistake. We recommend in this chapter that substantive updating of the MCA is required, as well as clarification of the place of the MCA principles in testamentary capacity.

We begin our empirical analysis of the case and potential for supported will-making in Chapter 4. In the first part of that chapter, we discuss perspectives from a wide range of care and support professionals about supporting will-making. We then move on to provide two 'case studies' from intellectually disabled people who have made a will, highlighting the interplay of support they received, and the problems that they experienced in making a will. As a result of our analysis in this chapter, we recommend training for both frontline care professionals and legal professionals as a mechanism for improving support for will-making.

In Chapter 5, we continue our empirical analysis by setting out three guiding principles that we consider must shape legal and policy reform in the area of supported will-making: trust, communication and accessibility. We make a range of recommendations here about the need for non-discriminatory, clear, appropriate and effective safeguards against abuse, and the introduction of an accessible information standard for legal services.

We conclude the report in Chapter 6 with a discussion of three options for reform to better support will-making by intellectually disabled people: changing practice through revision of the MCA Code of Practice and associated reforms; a bespoke 'supported-will' scheme; and a formal nominated supporter scheme. We conclude that whilst some of the changes that would be integral to a bespoke scheme (e.g., updates to the MCA Code of Practice, clarification of the place of the MCA principles in testamentary capacity, training, and non-discriminatory safeguards) are essential changes to law, a formal nominated supporter scheme is the most desirable approach.

CHAPTER 2. SUPPORTED DECISION-MAKING IN LAW AND PRACTICE

In this chapter, we offer a brief and selective overview of contemporary issues in, and legal approaches to, supported decision-making. This Chapter provides the underpinning legal justification for why a formal scheme for supported decision-making could be considered in England and Wales.

Difficulty making decisions can affect a remarkably large proportion of the population over their life course. Over 3 million people in the UK live with conditions that can cause difficulties with decision-making, including learning disabilities, acquired brain injuries and dementia (Harding, 2015). According to Mind, the mental health charity, one in four people in the UK will experience a mental health problem each year.[6] Some mental health problems (like, for example, depression and anxiety) can also make it very difficult for people to make decisions about their lives.

Historically, people with impairments that affect their decision-making abilities were considered to 'lack capacity'. In many jurisdictions worldwide, guardianship powers were created to allow others to make decisions on behalf of those who lacked capacity.[7] This once-normative response to intellectual disability has, however, been challenged in the last ten to fifteen years, as a result of disability activism, legal scholarship and the entry into force of the UN Convention on the Rights of Persons with Disabilities (CRPD). Of particular note is Article 12 CRPD, which requires States parties to "recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life".[8]

This controversial provision (Dhanda, 2006-2007), and its interpretation and implementation, has generated significant academic debate (Arstein-Kerslake & Flynn, 2016, 2017; De Bhailis & Flynn, 2017; Harding, 2015; Martin et al., 2016; Quinn, 2010). Some scholars consider that the Committee on the Rights of Persons with Disabilities (CommitteeRPD) have gone further in their interpretation than can be found in the text of the Convention (Martin, 2015). Others, persuaded by the basis of the CommitteeRPD's interpretation within the CRPD, seek to offer viable legal and jurisprudential solutions to the challenge posed by Article 12 (Flynn & Arstein-Kerslake, 2014).

Across a range of jurisdictions worldwide there have been significant moves towards CRPD compliance. Several legal systems have introduced reforms that aim to recognise the rights

[6] Mind (2017) Mental Health Facts and Statistics. Available at: http://www.mind.org.uk/information-support/types-of-mental-health-problems/statistics-and-facts-about-mental-health/how-common-are-mental-health-problems/#

[7] There is not space to go into detail on the history of capacity law here, as this is well-trodden ground. For more detail, see e.g., (Harding, 2018; Law Commission, 2017a; Richardson, 2012).

[8] UN CRPD Article 12(2)

of all disabled people to enjoy legal capacity on an equal basis with others, and to support in making legally relevant decisions. In this part, we discuss the approaches to supported decision-making across the UK jurisdictions, before providing an overview of contemporary international approaches to supporting legal capacity.

2.1 APPROACHES TO SUPPORTED DECISION-MAKING IN THE UNITED KINGDOM

A recent review of the approach to supported decision-making in the three jurisdictions of the UK concluded that none of the current approaches to supporting legal capacity in the UK jurisdictions is fully compliant with CRPD Article 12 (Martin et al., 2016). The aim of this section is not to give a full and detailed overview of how well the different jurisdictions in the UK comply with Article 12 CRPD, but rather to highlight points of commonality and divergence in the statutory approaches to supporting legal capacity.

2.1.1 ENGLAND AND WALES

The Mental Capacity Act 2005 (MCA) provides the statutory framework for adults with impaired mental capacity in England and Wales. The MCA rests on five principles:

1. A person must be assumed to have capacity unless it is established that he lacks capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.[9]

For the purposes of supported decision-making, the first three principles are of the greatest importance, though the way that the best interests standard is applied under the MCA is also of particular relevance to compliance with Article 12 CRPD.

Principle 1, the presumption of capacity, operates to ensure that mental capacity is understood as “decision-specific” and that a person may have the ability to make some decisions on their own and some with support, and yet other decisions may need to be taken by others in that person’s best interests.

[9] MCA 2005, s. 1.

Principle 2 requires that before a person is considered unable to make a decision (the definition of which is set out in s. 3 MCA), "all practicable steps to help" are to be taken to assist the person to make the decision. This principle, in essence, sets out a legal foundation for supported decision-making in English law. Our research has shown, however, that whilst decision-making support was well embedded in social care practice in relation to everyday choices, it was less available for more complex life choices and legal decisions (Harding & Taşcıoğlu, 2017, 2018). Frontline health and social care staff reported not having the skills or training to feel confident supporting their clients to make difficult or legal decisions (including decisions about wills). The lack of provisions in the MCA and the Code of Practice (Department for Constitutional Affairs, 2007) about what 'practicable steps' mean beyond communication techniques, information provision and making the person feel at ease also appeared to draw care professionals away from putting more comprehensive support mechanisms into practice to help disabled people make decisions about their lives.

Principle 3, which has translated in practice into allowing people to make unwise decisions, ensures that outcome-based assessments of capacity are not used. The CommitteeRPD were very clear in their first General Comment that they consider outcome-based capacity assessment to be a discriminatory practice, which is not compliant with Article 12. As we discuss below, the case law on testamentary capacity suggests that unwise or unusual testamentary choices may be held up to higher levels of scrutiny than those where the testator makes choices which adhere to more normative patterns of succession. This casts doubt upon the place of MCA principle 3 in the context of will-making.

In their report on *Mental Capacity and Deprivation of Liberty*, the Law Commission (2017b) recommended changes to the MCA that would bring English Law closer to compliance with Article 12 CRPD. These included changes to the priority to be given to the person's will and preferences in the best interests test, and a power to introduce a formal supported decision-making scheme. To date, neither of these recommendations have been taken up by the Government, despite the opportunity to do so in Mental Capacity (Amendment) Bill 2017-2019, which is progressing through Parliament. In respect to a formal supported decision-making scheme, the Government's response has been that, whilst they "are committed to the principle of supported decision-making", it is not clear "whether a new regulatory scheme is an appropriate response."[10]

Supported decision-making (in its wider sense) is also facilitated in the MCA through Lasting Power of Attorney (LPA) provision,[11] and legally recognised Advance Decisions to Refuse Treatment (ADRTs), including to refuse life-sustaining treatment, where specific

[10] https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-03-14/HCWS542/

[11] Mental Capacity Act 2005, ss. 9-14, 22-23, and Schedule 1; Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 SI 2007/1253.

requirements are met.[12] Entitlements to independent advocacy (IMCAs, IMHAs and Care Act Advocates) also fall into the broader supported decision-making spectrum. There are further piecemeal entitlements to support with decisions, from an Advocate or an 'Appropriate Person', under the Care Act 2014,[13] and from a 'Relevant Person's Representative' under the Deprivation of Liberty Safeguards.[14] In conclusion, the current approach to support for legal capacity in England and Wales is piecemeal, generated through a wide range of different statutory schemes, and currently lacks a coherent conceptual or legal thread.

2.1.2 SCOTLAND

Scotland was the first of the three UK jurisdictions to enact specific legislation to deal with adults with impaired mental capacity. The Adults with Incapacity (Scotland) Act 2000 (AWIA) takes a different approach to capacity than the MCA in England and Wales, focusing on persons who are "incapable", which means incapable of acting, or making decisions, or communicating decisions, or understanding decisions, or retaining the memory of decisions. Rather than using a best interests framework, the Scottish legislation focuses on the idea of 'benefit' to the adult, and will only authorise actions or decisions by proxies under the AWIA where the benefit "cannot reasonably be achieved without the intervention"[15]. Under the principles of the AWIA, account needs to be taken of the present and past wishes and feelings of the adult "so far as they can be ascertained". The views of the nearest relative and primary carer, guardian, attorney are also to be considered "in so far as it is reasonable and practical to do so"[16].

As with the MCA, the AWIA provides for supported decision-making through power of attorney. Continuing Power of Attorney under the AWIA, like Lasting Power of Attorney over financial affairs under the MCA, can come into force before a person loses capacity to manage their own affairs if they wish, whereas welfare power of attorney only comes into effect in the event of the granter's loss of capacity. In contrast to the English legislation, there is no formal recognition of ADRTs in the AWIA.

The Scottish Government are currently undertaking a review of the Adults with Incapacity (Scotland) Act. One of the aims of the review is to bring this legislation closer into compliance with Article 12 CRPD. Interestingly, despite the text and principles of the AWIA appearing to already sit more favourably with the CommitteeRPD's interpretation of Article 12 CRPD than the MCA, some commentators have suggested that judicial interpretation of

[12] Mental Capacity Act 2005, ss. 24-26.

[13] Care Act 2014, s. 67; Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014 SI 2014/2889.

[14] Schedule A1, Mental Capacity Act 2005. When the new Liberty Protection Safeguards are introduced, the equivalent of the Relevant Person's Representative will also be known as Appropriate Persons.

[15] AWIA 2000, section 1(2).

[16] AWIA 2000, section 1(4).

the AWIA has often hinged around objective 'best interests' considerations rather than supported decision-making (Ruck-Keene & Ward, 2016).

2.1.3 NORTHERN IRELAND

The Mental Capacity Act (Northern Ireland) 2016 is not yet in force. Whilst the MCA(NI) is fairly closely modelled on the MCA, there are some minor differences in the way that it treats supported decision-making. Of particular interest in the MCA(NI) is the specific mention of support for decision-making. Section 5 MCA(NI) sets out some specific 'practicable steps' that must be taken before a person can be regarded as unable to make their own decision. These are:

- Provision of all the relevant information in a way appropriate to the person's circumstances, including using accessible information or visual aids, or support;
- Ensuring that the matter is raised at a time and in an environment likely to help the person make decision;
- Ensuring that persons "whose involvement is likely to help the person to make a decision are involved in helping and supporting the person."

These steps are explicitly non-exhaustive.[17] The precise effect of the inclusion of these specific steps will become clearer when the statute is brought into force (it is anticipated that this will not be before 2020). Like the other jurisdictions, provision for power of attorney is included in the MCA(NI) for both financial affairs and for welfare issues. The MCA(NI) also includes provision for ADRTs, which are available at common law.[18]

2.1.4 CONCLUSIONS: SUPPORTED DECISION-MAKING IN THE UK

Capacity law across the UK has moved forward significantly since the turn of the century. Prior to 2000, no UK jurisdiction had a legislative regime that incorporated supported decision-making. Where provisions relating to those with impaired capacity existed either at common law through the Inherent Jurisdiction (in England and Wales)[19] or the *Curator Bonis* (in Scotland),[20] these frameworks were often significantly more restrictive than the current law, and placed little (if any) weight on the wishes and preferences of the person about whom the decision(s) were being made. The current situation, whilst complex and not fully compatible with the most expansive interpretations of Article 12 CRPD, provides a baseline recognition of legal authority for supported decision-making in the UK.

[17] Mental Capacity Act (Northern Ireland) 2016, section 5(6).

[18] Mental Capacity Act (Northern Ireland) 2016, section 11(2); s. 98 – 99; s. 137 and s. 284.

[19] *Re F (Mental Patient: Sterilisation)* 2 AC 1

[20] *Britton* v *Britton's Curator Bonis* 1992 SCLR 947. For a discussion of this regime, see Alex Ruck-Keene and Adrian Ward (2016).

2.2 INTERNATIONAL PERSPECTIVES ON SUPPORTED DECISION-MAKING

Internationally, several jurisdictions have made significant recent progress on statutory and regulatory responses to the challenge of supported decision-making and supporting intellectually disabled people to enjoy their legal capacity. In this section, we provide an overview of some international approaches, which could inform the development of future regulatory approaches to supported decision-making in England and Wales. In this part, we provide a brief overview of supported decision-making in Australia, Canada, Ireland, Peru and Sweden, five countries with new or established supported decision-making frameworks.

2.2.1 AUSTRALIA

As is common in a federal jurisdiction, each State and Territory in Australia takes a slightly different approach to regulating mental health and mental capacity. Several states have recently reformed their mental health and guardianship laws to enhance compatibility with the CRPD.[21] The most notable Australian example can be found in reforms introduced by the state of Victoria in response to the CRPD. In 2014, Victoria introduced the Power of Attorney Act 2014 and the Mental Health Act 2014, both to facilitate supported decision-making. The Power of Attorney Act 2014 adopted a functional approach to capacity, similar to the MCA in England and Wales. Like the MCA, decision-making capacity is presumed but the decision-maker is required to understand and retain information as well as to be able to weigh information as part of the decision making process.[22] The main premise of the Act is that powers of attorney are a supported decision-making mechanism for all matters (health and financial), as a replacement legal framework for an outdated guardianship approach.[23] Importantly, however, guardianship (for personal, lifestyle and medical decisions) and administration (for financial decisions) remain available in Victoria as a legal frameworks of last resort. Of particular interest is the introduction of a new 'supportive attorney' role.[24] A supportive attorney is appointed by a principal (who has the capacity to make the appointment) to support them in making decisions and in exercising their capacity effectively. A principal can authorise their supportive attorney to obtain information, to communicate a supported decision, or to do anything that is necessary to give effect to supported decisions.

Under the Medical Treatment Planning and Decisions Act 2016 a 'medical support person' can also be appointed to support medical decision-making. Little is known, as yet, about

[21] e.g. New South Wales 2015 Reforms to the Mental Health Act 2007; South Australia Mental Health Act 2009, s.21(1)(a) inserted by the Mental Health Review Amendment Act 2016; Queensland Mental Health Act 2016

[22] Power of Attorney Act 2014, s. 4(1).

[23] Ibid, s.1(e) and s.144

[24] Ibid, ss.85-93; See further: https://www.publicadvocate.vic.gov.au/power-of-attorney/supportive-attorney-appointments

how these new 'supported attorney' frameworks are operating in practice, and as there is no requirement for registration of supported attorneys, there are also limited data available about take-up. Another example of supported decision-making from the state of Victoria is the requirement in their Mental Health Act 2014 that patients in compulsory treatment are supported to participate in decisions made about their care and treatment.[25] The Act introduces a presumption of capacity into the regulation of mental health,[26] but it does still permit involuntary treatment, so stops short of full compliance with the CRPD.

2.2.2 CANADA

Canada has also made significant progress towards supporting legal capacity and CRPD compliance. British Columbia (BC) has had a formal supported decision-making framework in place since 1996,[27] and was the first jurisdiction worldwide to provide a formal alternative to guardianship or substituted decision-making under enduring power of attorney (Stainton, 2016). As with Victoria, Australia, the BC supported decision-making legislation operates as an alternative to, rather than a replacement for, guardianship. Similar legislative frameworks are also available in Alberta, Saskatchewan, and the Yukon. In Manitoba, supported decision-making is less formalised.

Under BC's Representation Agreement Act, intellectually disabled people can formally appoint a representative to assist them in making decisions in a wide variety of areas, including finances, healthcare, personal care and obtaining legal services.[28] Where finances are involved, a 'monitor' is required unless the representative is the person's spouse, or the person appoints two or more representatives to act jointly.[29] The BC legislation also provides for substitute decision-making, including substitute refusal of life-sustaining treatment and advance consent to treatment that may be refused when the person is unwell (Stainton, 2016).[30] Agreements under section 7 simply need to be made in the correct form and witnessed; those made under section 9 require consultation with a lawyer.

In 2017, the Law Commission of Ontario released its final report on Legal Capacity, Decision-making and Guardianship, following a large research and consultation initiative.[31] Part of that research included evaluation of how supported decision-making is working in practice in those provinces that already have legal frameworks (James & Watts, 2014). The evidence

[25] Mental Health Act 2014 (Victoria), s. 11(1)(c)

[26] ibid, ss. 70 and 68(1)

[27] Representation Agreement Act (1996).

[28] Representation Agreement Act (1996), section 7.

[29] Ibid, section 12.

[30] Ibid, section 9.

[31] The Law Commission of Ontario (March 2017). Legal Capacity, Decision-making and Guardianship [Final Report]. Available at: http://www.lco-cdo.org/wp-content/uploads/2017/03/CG-Final-Report-EN-online.pdf

suggests that supported decision-making is not well understood in British Columbia, and has more take-up from adults with learning disabilities than those with other kinds of capacity impairments (like, for example, acquired brain injuries or older adults with neurodegenerative diseases) (James & Watts, 2014). The BC model appears to work best when formal decision-making support is provided by someone who is already in a trusted or caring position for the person requiring support, and where third parties know both the adult and supporter well. Furthermore, James and Watts (2014) found that lawyers and health care providers did not fully trust supported decision-making, and preferred the certainty provided by substitute decision-making frameworks like power of attorney and forms of guardianship. In Alberta, it appears that the supported decision-making model is of use for older adults, who are using it to avoid privacy issues in healthcare, "as a justification for allowing family members or friends to attend doctor's appointments or to receive health information in particular" (James & Watts, 2014, p. 60). The situation in Manitoba is somewhat different, with supported decision-making taking place on a more informal level, with a focus on everyday decision-making, rather than more formal financial, legal or life decisions. This approach aligns quite closely with how support under principle 2 of the MCA has developed in practice in England and Wales (Harding & Taşcıoğlu, 2018).

2.2.3 REPUBLIC OF IRELAND

The Assisted Decision Making (Capacity) Act 2015 (ADMCA) sets out a comprehensive and graded scheme for supported decision-making in Irish Law. Whilst the Act is not yet fully in force, progress towards implementation is moving forwards, if somewhat slowly, with the current focus of activity being the drafting of the relevant Codes of Practice under the Act. At present, it is anticipated that the preparatory work towards bringing the Act into force may be completed by early 2020. The ADMCA, which rests on a functional approach to decision-making capacity, contains three types of support for legal capacity: Assisted Decision-Making, Co-Decision-Making, and Decision-Making Representative. Under a decision-making assistance agreement, an adult will be able to formally appoint a person to assist them in making decisions. Assisted decisions made under this framework are, in law, to be considered the decision of the person themselves. The assisted decision-making process is relatively informal, like the Canadian supported decision-making schemes, but in place of a 'monitor', assisted decision-making is to be supervised by the Director of the Decision Support Service.

Under the ADMCA, a co-decision-maker can be appointed where a person needs more substantial help with decision-making. In contrast to assisted decisions, decisions made under a co-decision-making agreement are to be considered in law to be jointly made by the person and their appointed co-decision-maker. Co-Decision-Making agreements must be registered before they come into force, and the co-decision-maker will be required to produce annual reports. The co-decision-making model means that decisions made under

that agreement cannot be challenged on grounds of a lack of capacity of the appointer.[32] Finally, the Decision-Making Representative is a substitute decision-maker, appointed by the court, in a manner very similar to the Deputy framework under the MCA. The new Irish legislation also allows a person to register an Enduring Power of Attorney (relating to property and finances, health and welfare, or a combination of both), and for Advance Healthcare Directives, including the appointment of a 'Designated Healthcare Representative' to make substitute decisions. How this complex tapestry of different supported and substituted decision-making processes will work in practice remains to be seen.

2.2.4 PERU

One of the most recently introduced legal frameworks for supported decision-making are the amendments to the Civil Code recently passed by Legislative Decree in Peru.[33] The Peruvian approach differs from those adopted in Australia, Canada and Ireland, in part because it is a civil jurisdiction. The legislative decree follows on from Peru's 2012 General Law on Persons with Disabilities, which recognised the legal capacity of persons with disabilities, but which could not be implemented without reforms to the Civil Code. The Legislative Decree therefore completes the reform process. The approach set out in the amended Civil Code allows disabled adults to appoint their supporter before a notary or competent judge.[34] How this new legal approach to support for legal capacity will translate in practice remains to be seen, but there are two particular points of note which set it apart from some of the other supported decision-making frameworks discussed here. First, the Peruvian law specifically recognises the equal legal capacity of disabled people, irrespective of whether it is exercised independently or with support.[35] This is a clear acknowledgement of the Committee on the Rights of Persons with Disabilities' interpretation of Article 12 CRPD. Second, the amendments to the civil code specifically include provision for disabled people to make a will with support.[36] None of the frameworks introduced in common law

[32] Section 23(1)

[33] Peruvian Government, Legislative Decree No 1384, Legislative Decree That Recognises and Regulates the Legal Capacity of Persons with Disabilities on Equal Basis 4 September 2018

[34] Article 659-D

[35] Article 3. – Legal Capacity: "Everyone has the legal capacity to enjoy and exercise their rights. The capacity to act can only be restricted by law. Persons with disabilities have capacity to act on an equal basis in all aspects of life" and Article 42. – Full Capacity to Act "Everyone over eighteen has full capacity to act. This includes all persons with disabilities, on an equal basis with others and in all aspects of life, regardless of whether they use or require reasonable accommodation or support for the expression of their will." Grateful thanks to Alberto Vasquez for translation and interpretation of the Legislative Degree and amendments to the Peruvian Civil Code.

[36] "Article 696.- Formalities of the will by public deed: The essential formalities of the will made in a public deed are: (...) 2.- That the will-maker expresses by themselves their will or, in the case of a person with a disability, with the provision of reasonable accommodation or supports for the expression of will, in the case they require it. If so required, by dictating the will to the notary or personally giving the provisions it should

jurisdictions to date include specific supported will-making provision, and it is not clear to what extent supported decision-making would assist an intellectually disabled person in Australia, Canada and Ireland to make a valid will and/or meet the threshold for testamentary capacity.[37]

2.2.5 SWEDEN

The Swedish god-man (custodian or mentor)[38] and förvaltare (trusteeship) system[39] are examples of some of the earliest supported decision-making mechanisms in law (Herr, 2003). The procedure to apply for either of these is similar, but the main difference is that the consent of an individual with disabilities is required for an appointment of a mentor, whereas an appointment of a trustee occurs without such consent (Johns, 2016). In addition, an individual may terminate the mentorship at any time and legal remedies exist against a mentor who acts outside of their authority (Devi, Bickenbach, & Stucki, 2011). A person with a 'god-man' retains their legal capacity and therefore the god-man system is argued to be respectful of the individual's wishes throughout all stages of decision-making and appears compliant with Article 12 CRPD (Devi et al., 2011). However, the system of förvaltare results in an individual losing their legal capacity and resembles an old-fashioned guardianship order (Herr, 2003), so the Swedish system is perhaps best considered to be a hybrid between supported and substitute decision-making.

In addition, the Swedish example suffers from various practical difficulties. The recruitment of mentors and trustees poses challenges as there are not enough mentors and trustees available, and measures are not always taken to identify persons who might need such

contain in writing. (...) 6.- That, during the reading, at the end of each clause, it is verified whether the content corresponds to the expression of their will. If the will-maker is a person with a disability, they can express their assent or observations through reasonable accommodations or supports if necessary. (...) 9.- That, in cases in which the support for a person with disability is through a beneficiary, the approval of the judge is required."

"Article 697.- Witness to a will at request: If the will-maker is illiterate, the will must be read twice, once by the notary and once by the witness designated by the will-maker. If the will-maker does not know or cannot sign, they will do so through the use of the fingerprint, all of which will be mentioned in the will. In case there is no fingerprint, the notary must make use of any other means of verification that allows proving the identity of the will-maker."

[37] Importantly, statutory wills are available in most Australian States and Territories, and in the Canadian province of New Brunswick, as well as in England and Wales (Harding, 2015).

[38]The Code on Parenthood and Guardianship (SFS 1949:381 chapter 11, paragraph 4):

"If, because of sickness, mental disorder, a weakened state of health or the like, a person needs assistance in safeguarding his rights, administering his property or providing for his needs, the Court shall, if needed, appoint a custodian (god man) for him."

[39] Ibid. Paragraph 7: "If a person who is in such a situation described in paragraph 4 is unable to take care of himself/herself or his/her property the court can appoint a trustee (förvaltare) for him or her."

assistance (Devi et al., 2011; Herr, 2003; Johns, 2016). Additionally, there is an identified need for education of mentors and trustees on their role, and overall, the success of Swedish legal framework is heavily dependent on the availability of economic resources (Johns, 2016).

2.3 CONCLUSIONS

As this somewhat selective tour of international approaches to supported decision-making makes clear, there has been a promising response to the call from the CommitteeRPD to reform capacity law to focus on supported decision-making frameworks. Several jurisdictions have substantively engaged with the CommitteeRPD's interpretation of Article 12 of the CRPD by repealing outdated guardianship laws and reforming laws relating to mental health and mental capacity to enhance their compatibility with the CRPD.

One of the challenges highlighted by examining supported decision-making frameworks across the globe is that there is still tendency at law to stereotype intellectually disabled people as lacking capacity. There is a clear prevalence of frameworks internationally that adopt a functional approach to capacity similar to the approach of the MCA 2005, though the precise form of these approaches varies significantly. More recent international developments, particularly the recent legal developments in Peru, have formally recognised the equal legal capacity of disabled people.

It appears that formal supported decision-making frameworks most often operate to formalise existing practices. However, as is consistent with the Everyday Decisions project findings (Harding & Taşcıoğlu, 2017, 2018), existing practice in supported decision-making is often more focused on supporting everyday decisions, rather than life choices or legal, financial or healthcare decisions. This is also mirrored in other jurisdictions with more informal supported decision-making frameworks such as Manitoba, Canada. Registered supporter frameworks do, however, appear to be working well in several jurisdictions, and supervision and monitoring of these is an important part of ensuring that these frameworks contain appropriate and effective safeguards. One potential problem of less formalised support frameworks (like principle 2 of the MCA) where there is no supervision of support for decision-making is that it may be more difficult to safeguard people against coercion or abuse from informal supporters.

Closely aligned to this issue is the challenge of ensuring that third parties (lawyers, health care professionals, banks and financial institutions) respect supported decisions and engage with the frameworks. The Alberta example demonstrates that training and careful consideration of the responsibilities and liabilities of different actors need to accompany any support-focused regulatory framework. The big task where supported decision-making schemes have been introduced is to change the attitudes of third parties towards supported decision-making, in order to increase confidence in utilising support frameworks.

Finally, existing research on supported decision-making in practice highlights that education and awareness raising is vital to the success of these frameworks. A lack of familiarity with supported decision-making frameworks results in various professionals' preference for substituted decisions. More importantly, the example of British Columbia shows that one of the major challenges in implementing supported decision-making is to ensure that people with disabilities, third parties and the public in general are aware of available supportive frameworks. Public engagement, education and training would therefore need to be a significant component of the implementation strategy for any formal supported will-making framework.

KEY FINDINGS

1. **Internationally, supported decision-making is becoming increasingly common.**
2. **Nominated supporter schemes are being used in a range of jurisdictions around the world to provide better support to intellectually disabled people.**

CHAPTER 3. LEGAL ISSUES IN SUPPORTED WILL-MAKING

At present, there are three approaches to testamentary decision-making in the context of impaired capacity in English law: 1) testamentary capacity under the *Banks* v *Goodfellow*[40] test; 2) statutory wills which use the Mental Capacity Act 2005 (MCA) functional test; and 3) the rules of intestate succession. These legal frameworks, and their respective benefits and problems, are well set out in the Law Commission's consultation on paper on making a will (Law Commission, 2017a), and we therefore do not set them out in detail here, but rather provide a brief overview to assist those who are unfamiliar with the current law. To aid understanding, we provide a diagram outlining the relationship between these legal frameworks in Figure 3.1. We also provide a brief overview here of the main mechanisms for challenging a will on the basis of lack of knowledge and approval, undue influence, fraud and mistake.

3.1 TESTAMENTARY CAPACITY

As discussed in the Law Commission's (Law Commission, 2017a) consultation on wills, the common law test for testamentary capacity in *Banks* v *Goodfellow*[41] is considered to have survived the MCA. This had been uncertain, until the differences between these two functional tests of capacity were considered in detail by Deputy Judge Nicholas Strauss QC in *Re Walker (deceased).*[42] Whilst there is some disagreement, it is now thought that the *Banks* v *Goodfellow* test sets a relatively lower bar than the functional test in s.3 MCA, particularly in respect of the foreseeability of the consequences of a testamentary disposition. There is also a difference in the level of understanding required in the two tests, with the MCA test requiring a person to understand all of the relevant information, whereas the *Banks* v *Goodfellow* test requires that the will represents the testators intentions, and that the testator "appreciates the claims to which he ought to give effect".[43] Finally, there is a difference between the two tests in relation to the burden of proof in respect of capacity. Under the MCA there is a presumption of capacity; under the common law test for testamentary capacity, the burden of proof regarding capacity shifts. Capacity will only be presumed under the common law test where the will is both duly executed and "appears rational on its face."[44] If capacity is not presumed, the person objecting to the will must raise a "real doubt about capacity,"[45] and then the burden of proof shifts back to the propounder of the will to establish capacity. Whether these minor differences between the

[40] (1869-70) LR 5 QB 549

[41] Ibid.

[42] [2014] EWHC 71 (Ch).

[43] Ibid, at [23]

[44] *Re Key (deceased)* [2010] EWHC 408 (Ch) at [97]

[45] Ibid.

common law and MCA tests for testamentary capacity remain depends on the ultimate outcome of the current review of the law of wills.

It is not entirely clear, at this time, to what extent the other MCA principles apply to legally relevant decisions for which capacity is assessed under a pre-existing common law test. Just as the presumption of capacity under the MCA does not currently apply to testamentary decisions, it appears that the other MCA principles also may not apply. The applicability of principle 3 (that a person is not to be considered to lack capacity merely because they make an unwise decision) is called into question by the fact that wills where the testator acts capriciously are subjected to a higher level of scrutiny.[46] As regards principle 2, 'all practicable steps' to help make a decision, the current situation is fairly complex in both law and practice as little guidance specific to supporting decision-making in the context of wills is available.

The main reason for the complexity is the operation of the 'Golden Rule', which operates as the primary safeguard for vulnerable testators. This 'rule', which is good practice rather than a substantive rule of law, was first articulated in an unreported case, *Kenward* v *Adams*.[47] The golden rule applies when making a will for "an aged testator or a testator who has suffered a serious illness", and suggests that it "ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and findings."[48] The content of the rule has developed to mean that a solicitor should gain independent medical capacity assessment where possible, and should interview a client without potential beneficiaries present if possible. Where either a medical capacity assessment or interviewing the client alone is not possible (whether because of time constraints, refusal by the testator to do so or other issue), contemporaneous notes should be taken, and the client advised of the possibility of a challenge to the will having a greater chance of success (The Law Society, 2013).

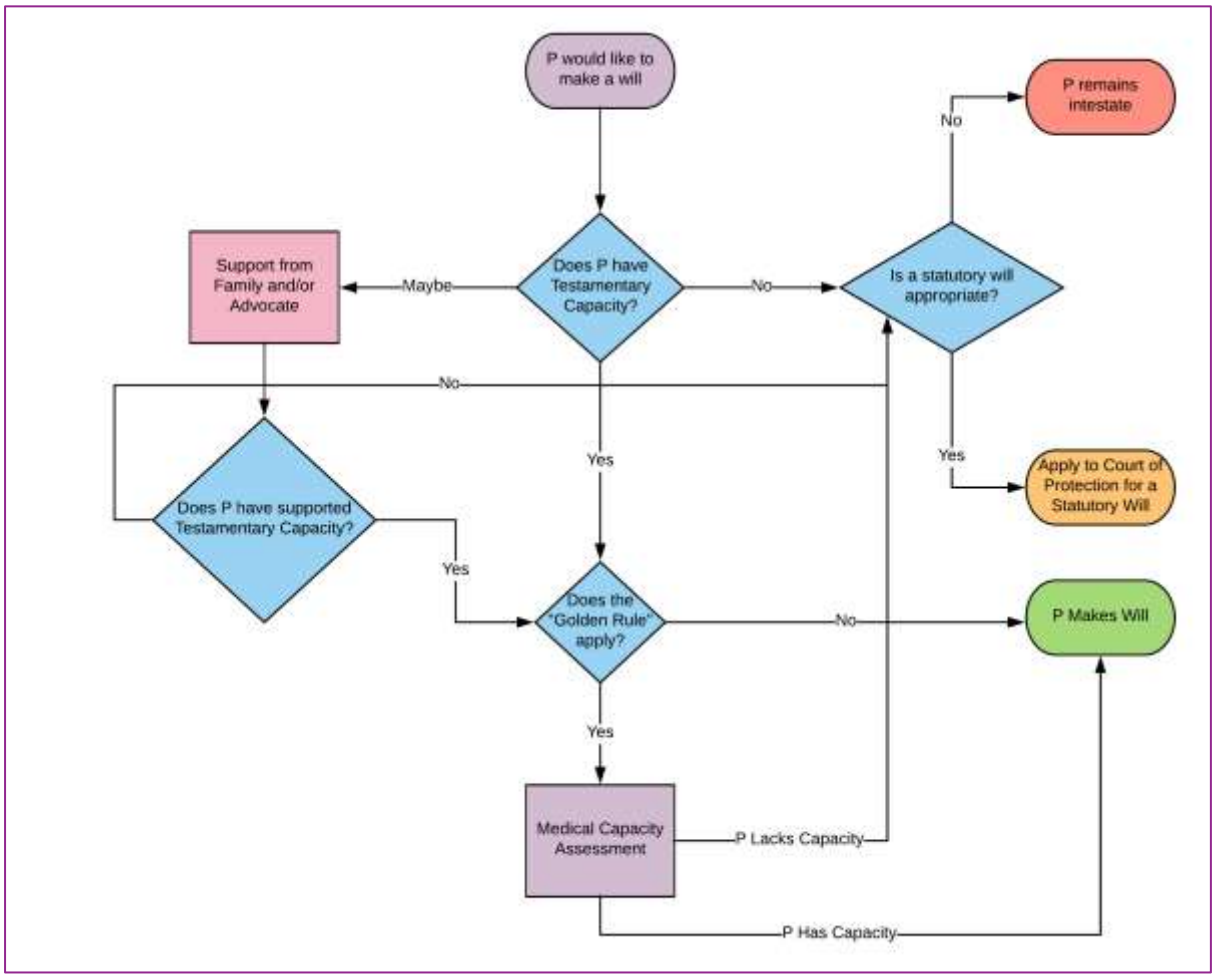
As can be seen by the flowchart set out in Figure 3.1, the place of support for decision-making under the current framework is much more tenuous than under the MCA. The 'golden rule' operates in isolation from supported decision-making, and in addition to it. Where an intellectually disabled person is making a will under the current framework, any support that is offered could be undermined by a medical capacity assessment, which is likely to focus on the testator's functional capacity. This is especially likely to be the case if the medical practitioner assesses the testator's capacity without support, given the lack of reference to support for decision-making in the *Banks* v *Goodfellow* test.

[46] *The Vegetarian Society* v *Scott* [2013] EWHC 4097 (Ch); Boughton v Knight (1872-75) LR 3 P & D 64.

[47] *Kenward* v *Adams* (1975) The Times, 29 November.

[48] *Re Simpson (Deceased)* (1977) 121 SJ 224.

FIGURE 3.1: THE CURRENT APPROACH TO SUPPORTED WILL-MAKING



Whilst it is extremely important to ensure that there are appropriate safeguards against undue influence in the context of wills (see further, section 3.4, and 5.4 below), this should not come at the expense of testamentary freedom, nor should safeguards operate in discriminatory ways. As discussed at length in the wills consultation paper (Law Commission, 2017a), both the rules relating to testamentary capacity, and the associated "golden rule" may benefit from being brought up to date in order to reflect contemporary understandings of disability and cognitive impairment. We return, in Chapter 6, to offer some suggestions for reform which could achieve a better balance between support for testamentary decision-making and protection from undue influence.

3.2 STATUTORY WILLS

Where a person lacks testamentary capacity, it may be possible to apply to the Court of Protection for a statutory will to be executed on the person's behalf. Statutory wills have been available since 1970, under powers first set out in the Mental Health Act 1959 (as amended by the Mental Health Act 1969), translated across into the Mental Health Act 1983, and most recently forming part of the MCA (Harding, 2015). Applications for statutory

wills can be costly[49] and complex, and the use of statutory wills is therefore limited to those who have the means to pay the necessary fees for legal advice and the approval of the Court of Protection. Statutory wills are unlikely to be appropriate for anyone of modest means.

Capacity (or more accurately lack of capacity) for the purposes of a statutory will is assessed through the MCA s.3 functional test, and therefore includes all of the MCA principles. Capacity under the MCA is a prospective assessment, whereas the common law test for testamentary capacity is most likely to be a retrospective analysis. Given that the MCA test is different from the common law test, it is technically possible for a person to fail the MCA test, but pass the *Banks* v *Goodfellow* test or vice-versa. A person might be more likely to fail the MCA test and pass the common law test where the particular testamentary decisions are fairly straightforward, but could have complex, yet reasonably foreseeable, consequences.[50] The opposite scenario appears most likely where a person makes a will, which is "unwise" or capricious, or where they are supported to express their (genuine) testamentary wishes by a beneficiary under the will and the will is challenged after the testator's death. Balancing the competing demands of the MCA and the common law test can be difficult for professionals, as we discuss in Chapter 4, below.

As statutory wills are essentially substitute decisions made under the MCA, these testamentary decisions must be made in the 'best interests' of the person lacking capacity, P. However, it is has not always been straightforward for the Court of Protection to articulate what 'best interests' means when concerned with the distribution of P's assets after death (Harding, 2015). In some of the earlier MCA cases, it was suggested that it was in P's best interests to be remembered for 'doing the right thing',[51] in others that best interests include avoiding being remembered for leaving a contentious probate dispute.[52] Case law involving complex family relationships often seeks to balance the interests of all of the testator's family members, dividing their estate accordingly.[53] Statutory wills are most appropriate where used to reinstate the testator's previously settled testamentary preferences, for example where a property bequest adeems,[54] where a previous will is automatically revoked by marriage,[55] or where there is a significant change in the relationships between the testator and a beneficiary.[56] Statutory wills are also useful where

[49] Usually over £5000, and sometimes much more (Law Commission, 2017a, p. 57).

[50] As was the case in *Re Walker (deceased)* [2014] EWHC 71 (Ch).

[51] *Re M (Statutory Will)* [2009] EWHC 2525 (Fam) [38].

[52] *Re D (Statutory Will)* [2010] EWHC 2159 (Ch).

[53] *NT v FS and others* [2013] EWHC 684 (COP)

[54] *In Re D (J)* [1982] Ch 237.

[55] *In Re Davey* [1981] 1 WLR 164.

[56] *Re Meek* [2014] EWCOP 1.

they can be used to prevent probate disputes either in relation to a suspicious will[57] or where there is a person who would have a claim under the family provision legislation but would not otherwise inherit under the intestacy rules (like, for example, a cohabitant).[58] As we discuss in Chapter 4, they can also be useful for avoiding disputes between family members in cases where there is a large personal injury settlement.

3.3 INTESTACY

If a person dies without a will in England and Wales, their assets will be distributed according to the rules on intestate succession, set out in the Administration of Estates Act 1925, as amended. These rules prioritise the surviving spouse or civil partner and children of the deceased.[59] The rules on intestacy were recently updated to reflect contemporary public opinion captured by a large-scale NatCen survey (Humphrey, Morrell, Mills, Douglas, & Woodward, 2010). Importantly, however, the disability status of respondents who took part in that study were not discussed in its final report, and it is not clear to what extent the survey captured disability status, nor whether the survey was generalizable as it relates to this group. It is not known whether intellectually disabled people hold similar views to the general population about the distribution of their assets on death, or whether their distinctive life experiences (perhaps including periods of time living in institutions, or receiving significant support from charities) might shape their views on inheritance and intestacy in different ways.

The interaction of these three elements of testamentary decision-making means that the current law relating to testamentary capacity is uncertain, with different approaches to capacity applying in different circumstances. One of the aims of the current Law Commission review of the law relating to wills is to bring these uncertainties in relation to capacity to make a will to an end. In order to do so, we consider that wider changes will be required, and that policy makers must give serious consideration to the potential benefits associated with the introduction of a formal supported decision-making system to enable intellectually disabled people to enjoy their testamentary capacity on an equal basis with others, subject to appropriate and effective safeguards.

3.4 CHALLENGING WILLS MADE BY VULNERABLE TESTATORS

Importantly, though robust statistical data is scarce, intellectually disabled people are assumed to be at a higher risk of being victims of financial abuse than non-disabled testators (Dalley, Gilhooly, Gilhooly, Levi, & Harries, 2017). It is not enough, therefore, to

[57] *Re D (Statutory Will)* [2010] EWHC 2159 (Ch).

[58] *NT v FS and others* [2013] EWHC 684 (COP).

[59] If the deceased leaves no surviving spouse, civil partner or children, then the estate would fall to the first of: parents, siblings, half-siblings, grandparents, aunts/uncles, and finally half-aunts/uncles before being considered bona vacantia and the property of the crown.

demonstrate that a person making a will had testamentary capacity to make that will, there is also a need for non-discriminatory, appropriate, and effective safeguards to protect vulnerable testators. Safeguards, if they are working properly, should ensure that the will is a true representation of testator's wishes, decided without undue external pressure. In this section, we offer a brief overview of the current approaches to challenging wills: lack of knowledge and approval, undue influence, mistake and fraud, and discuss whether these safeguards are sufficient to protect disabled testators from abuse.

A will is valid when the testator had knowledge of the content of their will and approved of it.[60] The burden of proof in challenges to a will on the basis of knowledge and approval lies with the person propounding the will.[61] Knowledge and approval will be presumed if a will has been executed properly. To challenge a will on the basis of lack of knowledge and approval, the person challenging the will must prove (on the balance of probabilities) that the testator was not aware of the contents of the will or that there were some suspicious circumstances.[62] In these instances, it is not uncommon for issues of undue influence or criminal activity such as fraud to be raised, both of which are separate grounds for contesting a will. Additional evidence may be required if the testator is blind,[63] deaf,[64] unable to talk,[65] or illiterate,[66] and in some cases the courts have made clearer the link between knowledge and approval, understanding and capacity.[67] Further, it is possible for a testator to have knowledge and approval of only parts of a will.[68] Despite some academic and judicial discussion about whether the test for knowledge and approval is a one-stage or two-stage test (Law Commission, 2017a), the one-stage test is more often used to determinate if the testator had knowledge and approval of the contents of the will. [69] This test requires the Court to consider all relevant evidence available to it to establish whether there the testator did, in fact, know and approve of the contents of the will.

Another important ground upon which a will made by an intellectually disabled testator might be contested is undue influence. Under the general doctrine of undue influence, there is a presumption of undue influence where there is a relationship of trust.[70] No such

[60] *Ark v Kaur* [2010] EWHC 2314 (Ch); *Perrins v Holland* [2010] EWCA Civ 840

[61] *Barry v Butlin* (1838) 2 Moo PC 480 at 482.

[62] *Hoff v Atherton*, [2004] EWCA Civ 1554

[63] Non-Contentious Probate Rules 1987, rule 13.

[64] *Re Geale's Goods* (1864) 3 Sw & Tr 431.

[65] Ibid.

[66] Non-Contentious Probate Rules 1987, rule 13.

[67] *Hoff v Atherton*, [2004] EWCA Civ 1554

[68] *Fuller v Strum* [2001] EWCA Civ 1879.

[69] *Gill v Woodall* [2010] EWCA Civ 1430.

[70] *Royal Bank* v *Etridge (No 2)* (2001) UKHL44; [2002] 2 AC 773.

presumption applies to undue influence in wills, and the burden of proof falls on the individual challenging the will. As a result, the person challenging the will must prove that there was an actual undue influence, which is limited to coercion, best explained by Mr Justice Lewinson:

> Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion.[71]

As a result of this focus on coercion beyond the testator's judgment, it can be very difficult to prove undue influence, even where a testator was clearly vulnerable at the time a will was made.[72]

It is also possible to challenge a will on the basis of mistake or fraud. Examples of mistake might include: erroneous wording,[73] omissions,[74] or signing the wrong will.[75] A mistaken belief is not enough to challenge a will; instead, instances of mistaken belief must result from a false representation.[76] Like undue influence, fraud is difficult to prove, and the burden of proof falls on the person alleging the fraud.[77] Very few claims of fraud in a will have been successful in the courts (Kerridge, 2000).

As this brief discussion of the law concerning challenging wills by vulnerable testators shows, the current approach to protecting vulnerable testators from financial abuse through their will focuses on challenges to wills after the testator's death. Wills are rarely challenged, and when they are, there is a low success rate. The concept of testamentary capacity, and the 'golden rule' discussed above are, therefore, the main current safeguards against financial abuse for vulnerable testators (see Figure 3.2). Part of the reason why it is so difficult to challenge a will rests with the complexities of providing evidence of misdeeds without contemporary evidence of the testators wishes: the most important witness in any challenge to a will is always, of course, deceased.

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[71] *Re Edwards* (deceased) 2007] EWHC 1119 (Ch) at [47].

[72] See *Edkins* v *Hopkins* [2016] EWHC 2542 (Ch) for a recent example.

[73] *In the Goods of Swords* [1952] P. 368.

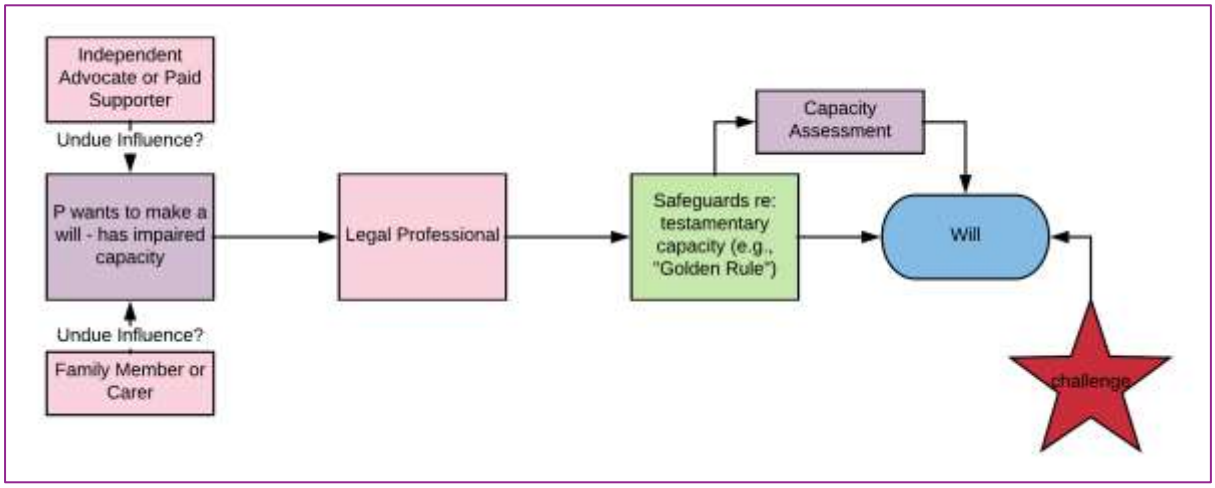
[74] *Re Reynette-James* [1976] 1 WLR 161.

[75] *In the Goods of Hunt* (1875) LR 3 P&D 250.

[76] *Re Bellis* [1929] 141 LT 245.

[77] *Craig* v. *Lamoureux* [1920] AC 349.

FIGURE 3.2 CURRENT APPROACH TO SAFEGUARDS IN WILL-MAKING



This current approach to safeguarding a vulnerable testator from financial abuse relating to writing their will relies on capacity assessment (whether by the legal professional taking instructions for and preparing a will, or from a medical practitioner), which means that the safeguards are focused on the cognitive abilities of the disabled person, and their ability to rationalise their testamentary choices. There is no scrutiny, in the current approach to safeguards against financial abuse in will-making, of the motives, character or actions of the third parties who would be potentially responsible for any financial abuse at the time of making the will. As we will discuss through our empirical analysis, and in our final chapter setting out options for reform, this approach is unlikely to be compliant with the requirement in Article 12(4) CRPD for appropriate and effective safeguards to protect disabled people from abuse in the enjoyment of their legal capacity.

3.5 CONCLUSIONS

This chapter has set out a brief overview of the current legal issues in supporting will-making by intellectually disabled people. We discussed the current approach to testamentary capacity, and the difficulties that the surviving common law test raises in relation to the applicability of the positive principles of the MCA concerning the presumption of capacity, respect for unwise decisions, and the duty to provide all practicable support before determining that a person lacks capacity. We also briefly discussed the problems that could arise given that statutory wills use a different test for testamentary capacity (the MCA test). In respect of intestacy, we noted that whilst there is robust evidence for the views of the majority population in relation to questions of succession and intestacy, less is known about the difference disability makes. We discuss this in more depth through our empirical analysis, in chapters 4 and 5 below. We concluded this chapter with a discussion of the effectiveness and appropriateness of current

safeguards against financial abuse for vulnerable testators, an issue we will return to in more detail in chapters 5 and 6.

KEY FINDINGS:

3. **There is a gap between the intestacy rules and (expensive) statutory wills in access to appropriate support for making a will in England and Wales.**

4. **The relationship between the common law test for testamentary capacity and the Mental Capacity Act 2005 principles is legally unclear.**

RECOMMENDATIONS FOR REFORM:

1. **Substantive updating of the Mental Capacity Act 2005 Code of Practice is needed to include more examples of how to support decision-making in general, and supporting will-making in particular.**

2. **Clarification of how the Mental Capacity Act 2005 principles (especially principles 1, 2 and 3), interact with conflicting approaches in common law capacity tests is required.**

CHAPTER 4. PRACTICAL ISSUES IN SUPPORTED WILL-MAKING

We turn, now, to explore how participants in the Everyday Decisions research and follow-up interviews experienced the current legal framework surrounding wills, highlighting some of the challenges presented by the operation of the current law. We begin by discussing care professionals' approaches to, and experiences of, supporting intellectually disabled people in making wills, and in navigating the current legal framework. We then explore the views, attitudes and experiences of intellectually disabled people in the area of wills and accessing support to make a will, through two case studies of intellectually disabled adults who have made a will.

4.1 PROFESSIONAL PERSPECTIVES

Only a minority of the care professionals who participated in the Everyday Decisions research project had direct experience of supporting clients, patients or service users to make a will. This appears to be a consequence of three intersecting issues:

1) a general lack of knowledge and understanding about wills;
2) difficulties in identifying who does or should have responsibility for supporting will-making;
3) attitudes to supporting will-making and assessing testamentary capacity.

We discuss each of these in turn, with reference to the Everyday Decisions project data (Harding & Taşcıoğlu, 2017, 2018).

4.1.1 KNOWLEDGE, UNDERSTANDING AND EXPERIENCE OF WILL-MAKING

As can be seen from Excerpts 1 (below), frontline care and support workers who participated in this project had generally never been involved in supporting a service user to make a will. For many, this was because the issue of wills did not come up in their daily work. For others, it was because they did not see talking to people about wills as part of their role, but perhaps something that their manager would be more likely to be involved with. More senior care professionals, in turn, constructed the issue of wills as falling outside of their area of expertise, and best left to legal professionals, advocates or other third parties, like deputies. This was especially the case where a client had a solicitor involved, or a deputy appointed by the Court of Protection.

Whilst it may well be appropriate to delegate support for making a will to professionals with knowledge, skill, and expertise, it is also important that frontline care professionals are aware of the importance of estate planning for the people they support. Whereas older people with neurodegenerative disease, like dementia, may well have already made a will before requiring support from social care professionals, people with learning disabilities or other kinds of acquired brain injuries may not have previously considered wills, power of

attorney or estate planning. As we discuss below, the issue of wills and inheritance might be most likely to come up for people with lifelong intellectual disabilities at points in their lives when their family relationships change, perhaps when a partner or parent dies and leaves money or property to them. As a result, it is important that frontline social care staff have some awareness of when, and why, a person might need to make a will or review their existing will so that intellectually disabled people can be directed to the right external support at the right time.

Box 4.1: Excerpts 1

Wills? I haven't come across that yet. I haven't come across any of them yet. (Lily, 18-25, Senior Care Assistant)

Wills? I'm not- I don't think there's anybody here that's got a will in place… I did not have any sort of influence or connection with wills or anything of that sort, no. … No, my manager will be your best bet to answer all them questions, because we don't. (Jennifer, 35-44, Team Leader)

It's about using external resources, so it would like the IMCAs and solicitors and stuff like that, god I wouldn't know how to make a will. No chance, as I say, I need to do one myself to be fair. (Julia, 45-54, Care Manager)

Wills, again that's another thing, I leave that to the solicitors. Yeah, I wouldn't touch upon that either. Yeah, the solicitors will do all that. (Patricia, 35-44, Senior Case Manager)

Wills no, I've never talked to anybody about a will. Power of attorney, yes, but most of my clients have got a solicitor involved, so they would discuss that with them. (Angela, 45-54, Case Manager/Occupational Therapist)

Very limited on the wills front. … Because most of our clients are through Court of Protection, they have a court appointed deputy, so they manage a lot of their financial [matters]. (Dave, 25-34, Assistant Case Manager)

4.1.2 IDENTIFYING THE RIGHT PERSON TO SUPPORT WILL-MAKING

In the Everyday Decisions project, three categories of people were identified by care professionals as appropriate to support will-making: families, court appointed deputies, and solicitors. For many frontline care professionals, the issue of wills and inheritance was most appropriately left to families:

> Wills, we've got one gentleman whose dad's quite involved with his care, and he's got all that sorted out. We haven't actually discussed it with the client, because

> obviously the father's, the mum and dad are still alive so they've sorted everything out for if anything happens to them. But it's usually dealt with by families. (Hannah, 45-54, Deputy Care Service Manager)

Where intellectually disabled people have supportive families, who act in accordance with that person's wishes and preferences and in line with the best interests standards in the Mental Capacity Act 2005 (MCA), this is likely to be an appropriate response. Where people have no or limited family, where family relationships are not positive and supportive, or where family members underestimate the abilities of an intellectually disabled person, leaving the issue of wills and inheritance to family may cause problems. Several of the intellectually disabled participants in this project had limited or no family. We discuss their stories in part 4.2, below, and in Chapter 5.

For many intellectually disabled people, their family will be their most important source of care, support and advice. For others, however, family relationships can be strained, and money and inheritance can be a source of contention. Consider, for example, this story told by Julia about supporting a service user to make a will:

> He had inherited some money from his mum, and we had an advocate involved for him to work with him, and we also got him a solicitor, and enabled him to make his will, to make a will. So, in the unfortunate event of something happening, which unfortunately then it did, because he didn't like to talk about death and dying and all of that. And, because he'd got, there was a lot of contention between him and his sister, because obviously mum had left him everything as opposed to her, and she felt because he had a learning disability then really it should have all gone to her and he shouldn't have had it because he can't make all these decisions. But he was quite an intelligent man. He has Asperger's. And so we got him, it was just an advocate at the time, it wasn't an Independent Mental Capacity Advocate, it was just a normal advocate, and we arranged for a solicitor, and they came and they worked with him in order for him to be able to make a will as to what he was leaving to whom. (Julia, 45-54, Care Manager)

Solutions in these kinds of cases can include drawing in a range of external sources of advice and support. Consider, for example, the approach that Alice takes to supporting clients to make a will:

> Because the majority of my clients have a lot of money, that's quite contentious with the family, and what we tend to do [with wills] is get a specialist assessment so that nobody can come back and say "he never really wanted that, it was this, you influenced him." So because it's quite important, we get somebody in who doesn't know the person, that's – they're an expert in doing that and if they're going to do that, that'll be fine. Most of the time most people can make a will- I've had a few

> that have had a statutory will, but most of them can do [it]. (Alice, 55-64, Case Manager/Occupational Therapist)

Here, Alice constructs the issue of writing of a will as something that needs external, expert input both in order to ensure that the person's wishes are fully explored, and also to protect care and support staff from accusations of undue influence.

External support is not, however, universally successful, with some care professionals reporting difficulties in managing relationships between family members and paid care staff. Consider, for example, this story from Eva, a care coordinator within a case management provider.

> There's a client that I work with now who's just made her will. But that was all done through the deputy. So they arranged for her capacity assessment. She's an interesting case actually. She was born with cerebral palsy. She's got really limited speech, like two or three words she could say. She's lived in the family home all her life, and they've got care staff. And recently she got a new therapist, a speech and language therapist who's given her an eye gaze. So they've given her an eye gaze and they've been working with her on how to use that. And over the last two years she's gone from somebody that didn't have any kind of input into what happened to her, to somebody that's just gone and made their own will. Because with the therapist's help and the right technology she's actually been able to express an opinion, and it's been clear to everybody. …She's a really intelligent young lady. The trouble is that her mum doesn't think that she has got all this ability. She doesn't think the therapist and her staff know her daughter as well as she does. ... So mum is being very resistant and not letting her make her own decisions, and the staff are really stuck in the middle. (Eva, 35-44, Care Coordinator)

It is important not to generalise about the relationships between disabled people and their families from a small number of cases, and our intention in reporting these examples is merely to highlight that will-making can involve interpersonal challenges within families. These challenges can relate to the complexities that money brings to family relationships, particularly where there are large compensation pay-outs like those involved in some personal injury settlements. Challenges can also arise between siblings in relation to inheritance from parents, or within extended families where a disabled person inherits substantial sums. Finally, there are difficulties associated with balancing the professional knowledge and expertise of care and support professionals with the experiential knowledge of families and carers. Responding appropriately to these challenges, whilst facilitating will-making by intellectually disabled people, requires attentiveness to the complexities of financial decision-making within familial relationships. Also required are appropriate safeguards to protect intellectually disabled people from undue influence and abuse, and to protect families and care and support professionals from unfounded accusations of undue influence or abuse.

4.1.3 ATTITUDES TO SUPPORTING WILL-MAKING AND ASSESSING TESTAMENTARY CAPACITY

A third issue that arose from the care professional participant interviews was a sense that service users lacked understanding about wills, and that as a consequence it was most appropriate for their belongings and any money they have to go back to their family when they die. It was often not clear to what extent those who suggested that their service users lacked testamentary capacity had attempted to provide support, either through providing accessible information or by using nuanced communication strategies.

> I don't think we've got any wills, because I don't think they would understand. You know like a will you would leave your belongings, I'm not sure whether this company would go to next of kin. But I don't think, maybe [one woman], she would know more about wills and what that entails. But the others I don't think [the others would know]. (Anne, 45-54, Frontline Care Team Leader)

Even where specialist advice has been sought, and provided, wills were understood by most of the professional participants in this research in their most straightforward terms as a vehicle for expressing what a person would want to happen to their money and belongings after they die.

> I mean, with wills, we did have somebody come in from a law firm a couple of years back and he sat down and talked with a few people and he said nobody has got the capacity here to make that decision over a will. Again, because no one has really got vast amounts of money or valuables anyway, so it was just generally, things would be passed on to their family members and that's what generally happens across the board. Unless somebody had a real love for cats and said they want to leave it all to the Cats Protection League or something, but no one does. Generally, it tends to be, it just goes back to the family. (Leslie, 35-44, Care Provider Manager)

The wider purposes of a will, such as appointing executors, making choices about the disposal of the body, dealing with digital assets, or appointing guardians for minor children were not mentioned by any of the care professionals involved in this research. Whilst, of course, financial aspects of testamentary decision-making are extremely important, engagement with the wider purposes of wills, and using will-making as an opportunity to discuss future care preferences might also be beneficial.

A minority of the professional participants in this research had direct experience of assessing testamentary capacity, in line with the *Banks* v *Goodfellow* test. For some, the relevant test is clear and easy to follow, using a 'checklist' approach.

> The case law on the assessment of testamentary capacity is so extensive and clear and it's well codified in this book. And if you Google testamentary capacity there's numerous law firms that have written checklists for solicitors and others saying, you

> know, what are the main things to look for. And I have a mental checklist and I always go back to this and consult the physical checklist. So does the person understand what a will is? Yes or no. If they don't, could they be helped to understand. Do they understand what their estate is? And most people don't, so I typically say well your estate is all your stuff. Everything you, everything you have and if they don't understand can they be helped to understand. Do they understand that there are people who naturally have a prior claim upon the estate, family, you know, you know the hierarchy of family members, yes or no. Do they understand that the will is their will and nobody else's? Do they understand that the will can be changed at absolutely any time? Yes or no. And I mean those are actually simple questions to ask somebody. (Andrew, 65-74, Professional Capacity Assessor)

For others, the interaction of the common law test for testamentary capacity and the MCA test for statutory wills complicated matters.

> So I did it sort of partly as the *Banks* v *Goodfellow*, and partly on the Mental Capacity Act assessment of capacity, and I actually took advice on it. … Basically I was asked to fill in a form, which was the wrong form, but it was the lawyer who should have known that. So I tried to put this *Banks* v *Goodfellow* material [in the] COP3 and it didn't work. So when I, I managed it in a devious way really, but we had to manipulate it or manoeuvre the wording a bit, and then it did make sense. (Linda, 65-74, Professional Capacity Assessor)

Importantly, testamentary capacity, like capacity to make other kinds of decisions can fluctuate for people who have particular kinds of impairments, or who have borderline capacity and may be able to express a view at some points but not at others. As well as making sure that capacity assessments take place in spaces that the person is comfortable in, and at times that they are most likely to be able to talk about the issues, it can be important to take a longer view of capacity, being alert to external factors that might shape or mask the person's testamentary wishes. Consider, for example, the following story from Adrian, a case manager, who suggests a more nuanced approach is needed when dealing with a person with fluctuating wishes, and potentially fluctuating capacity.

> [The deputy, a solicitor] sat down with her and he asked her about her will. He was trying to test out whether she has testamentary capacity - it was very borderline if she did. So, the first time he spoke to her, she said "I want to leave something like half my money to my sister and then I want to leave nothing to my effing brother" and she just blah, blah, really mouthing off about it and then named a charity for dogs, whatever. He said OK. And so he wrote it up and he left it for two weeks and just rang her about and said I'm just interested in doing your will, and she did the reverse. She said, "I want my brother, my sister she can f*** off." And it was like OK. And he did it a third time, it had reversed again.

> [So] he thought, “OK you don't have testamentary capacity; you are changing your mind every single time somebody posts on your Facebook you disagree with.” And ultimately if you sit down with her she's a very family-centred person, and actually she wouldn't want to cause a ruction in her family, so she was defined as lacking in testamentary capacity and he wrote a [statutory] will giving equal parity to family members. Since then she's had a child. So that's been reversed. So it's now all down for her child. But what was really interesting was that rather than just taking what she said first time, and accepting it, he tested it out. (Adrian, 45-54, Case Manager)

As well as highlighting the importance of being alert to fluctuations in both a person’s capacity and in their expressed preferences, Adrian’s story highlights the way that testamentary capacity interacts with the current system of statutory wills. Again, as this narrative comes from the context of acquired brain injury case management, there are funds available within the intellectually disabled person’s settlement to pay for case management, a professional deputy, solicitor’s fees and for the court costs associated with a statutory will. Not all intellectually disabled people have access to the funds required to engage this level of support, in which case it may not be possible to fund an application for a statutory will.

> Yes, well deputies have a responsibility to make sure people have wills. But sometimes they’re not necessary, so you don’t need a statutory will. So if you haven’t made a will there are two options. You either don’t make one I suppose. If you’ve lost capacity, the rules of intestacy, you have to look at the rules of intestacy, the law on intestacy to decide whether you need a statutory will. And if it would naturally go to the person who the other person would want, there’s absolutely no point in spending a fortune on a statutory will. (Linda, 65-74, Professional Capacity Assessor)

As Linda (a former social worker who now works for a regulatory body in the mental capacity field and undertakes capacity assessments) suggests, because statutory wills are so expensive, the rules of intestate succession remain the more usual fall-back position. Whilst the ordinary rules of intestate succession may be appropriate, as we discuss in the next part, disabled people’s experiences suggest that there are additional nuances, related to disability, that mean that the intestacy rules may not always provide an outcome which aligns with the person’s wishes. In cases where the estate is not sufficiently large to make a statutory will application a cost-effective way of responding to a lack of testamentary capacity, and where the rules of intestate succession would not provide the outcome that the person would prefer, there is a gap in legal provision. This gap could be filled by a formal supported will-making scheme.

4.1.4 SUMMARY

In summary, this research uncovered a relative lack of attentiveness to the issue of will-making within social care contexts. Whilst intellectually disabled people are supported to make a great number of everyday decisions, and many life choices, decision-making that entails more complex legal frameworks (like wills) is not well supported by frontline care staff (Harding & Taşcıoğlu, 2018). Many care professionals viewed supporting will-making as outside of their role, preferring instead to leave supporting people to make a will to external third parties like families, court appointed deputies, or legal professionals. Notwithstanding the importance of ensuring that legal advice and support comes from someone who has the appropriate level of knowledge, understanding and skill, the lack of engagement with testamentary planning by these care professionals suggests that there is a gap in the provision of informal, introductory advice about will-making in the disability support sector. Finally, professional participants in the Everyday Decisions research highlighted the interaction between testamentary capacity, statutory wills and intestacy, noting that the expense associated with statutory wills means that they are not always appropriate. We discuss the possibilities and challenges of filling these gaps in supported decision-making in Chapter 5.

4.2 DISABLED PEOPLE'S EXPERIENCES

In order to highlight the main issues in disabled people's experiences, we now turn to discuss disabled people's experiences of wills and inheritance. In Chapter 5, we offer a thematic analysis of guiding concepts in supporting will-making by people with intellectual disabilities. We set the scene here by describing two stories about will-making from intellectually disabled participants in this research: Penny and Gareth. These two case studies, which have been generated from individual interviews with intellectually disabled participants, highlight many of the main issues that run through disabled people's experiences of wills, inheritance, and testamentary decision-making.

4.2.1 PENNY

Penny is an older woman with sensory, intellectual and physical impairments. She has two daughters with learning disabilities and sensory impairments. When her husband was alive, and their daughters were younger, they wrote mirror wills, which left all of their assets to each other, or if they died together, their assets were to be split five ways between their two children, and his three children from a previous marriage. Following her husband's recent death, Penny inherited all of her husband's estate, and made a new will leaving all of her assets to her two disabled daughters. She was supported to make this new will by three people: her stepson, a solicitor, and an independent advocate. Penny's story is told in Box 4.2 in her own words.

Box 4.2: Penny's Story

We first made our will, I forget, we made it years and years ago the first one. Because what we did we took, one daughter was still at school and the eldest one had just started college and we took, we went to see the solicitor and we took [them to] the solicitor so that he can [meet] the girls. So they knew about the girls and everything. If we'd had died together the house would have been split between, because I've got stepchildren and it would have been split five ways. But as it was my son said "Oh, you and the girls just have the money" he said. But he's not the eldest, I've got a stepdaughter. But he was the one that come and helped me. I think [he did that] because he didn't want it to be split up. Because all the kids were, they're older and they're all working and he'd got a family anyway himself.

I made [the will] with the solicitor. But I had, my stepson was there helping me as well. And we had another lady that was helping me. She was an advocate. I used to do a lot of work with [a charity] and she was my support at [the charity]. I wanted someone there that knew what legal papers [meant], and she knew all about our lives, [because I've known her a long time].

A will means that if you've got money and stuff, you leave it to the girls. And they get [it]. We did it through the solicitor. There wasn't much else that we did really. We made sure that the girls were OK.

Actually, [my advocate] never actually really went with me when I went, it used to be me, my stepson and his partner. But she never, she didn't do any talking; it was just me and [my stepson]. [My advocate just helped me to decide what I wanted to do]. It's good to have someone you've known for a long time. You don't want to start with someone afresh and tell them, because it would take ages wouldn't it?

Penny's story highlights four issues in supporting will-making: the importance of making a new will when circumstances change; complexities associated with blended families and second marriages; the difference that disability can make to testamentary choices; and the need for trusted support in addition to legal advice and assistance.

The need to make a new will when circumstances change is well known, and it is good practice for solicitors to advise their clients to review their wills on a regular basis, for example every five years or on particular life milestones like buying or selling property, relationship breakdowns or having children. Intellectual disability does not change the need to keep testamentary decisions under review, indeed there may be additional life milestones that would precipitate a review of testamentary choices, like moving into residential care.

The difference between the mirror wills that Penny and her husband made (which split their combined assets across his five children) and the will that Penny made after her husband died and she inherited the property he had owned highlights the complexities of contemporary family relationships. It is notable that in this instance it was one of Penny's stepchildren who helped her to make the new will, and went with her to the solicitor's office, despite being effectively disinherited by her new will. Whereas in civil law jurisdictions, all of a person's biological children are generally protected by their legal rights to inherit,[78] the English law approach to testamentary freedom means that children lose any claim to a portion of their deceased parent's estate in these circumstances. This kind of disruption in the normative patterns of inheritance can cause friction within familial relationships, and empirical research has shown that people in general are less supportive of second spouses inheriting the entire estate when the deceased has children from a previous relationship (Humphrey et al., 2010).

In Penny's story, we see that rather than distributing assets equally across all of her late husband's children, one of her stepchildren helped her to make a new will that gives priority to the needs of her two disabled daughters. Generic empirical research into testamentary choices suggests that protecting the inheritance of children from a previous relationship holds significant popular support (Douglas, Woodward, Humphrey, Mills, & Morrell, 2011; Douglas, Woodward, Humphrey, Morrell, & Mills, 2010). There was, however, no suggestion from Penny that her stepchildren were anything other than supportive of her decision to leave all of the assets she inherited from their late father to his two disabled children (their half siblings). This may reflect the difference that disability makes in attitudes to inheritance, where needs may be prioritised over generic views about entitlements to inherit (Humphrey et al., 2010). As discussed above, however, sometimes the prioritisation of disabled children in inheritance can become a point of contention between family members.

Finally, it is notable that Penny drew on support from a legal professional, a family member and an independent advocate with whom she had a longstanding relationship. Often, support with decision-making under the MCA is understood narrowly, and as limited to the issues discussed in Chapter 3 of the Code of Practice: providing information relevant to the decision; using communication methods that help the person to understand the information; and ensuring that the location and timing of the decision are helpful in putting the person at ease. Supporting a person to make a will entails supporting them in piecing together a range of different, and sometimes complex information. Making a will often includes repeat visits to a legal professional. Even though rule in *Parker* v *Felgate*[79] means that a person may only need to have capacity at time of instructing their solicitor to prepare the will (Law Commission, 2017a), most intellectually disabled people will require support

[78] For example, under the Succession (Scotland) Act 1964, the deceased's children have a right to inherit one-third of the moveable estate, split between them irrespective of whether or not the deceased had a will.

[79] *Parker v Felgate* 1883 8 PD 171

throughout the process. Whilst it may be possible that one person, with sufficient awareness of both the legal frameworks and the life circumstances and estate of the person making a will, could provide all of the necessary support, the involvement of multiple parties may well help to safeguard the intellectually disabled person from undue influence or financial abuse.

4.2.2 GARETH

Like Penny, Gareth has both learning disabilities and sensory impairments. In his interview, with the help of his personal assistant (PA), he spoke about having written his will twice, both times through a solicitor, and both times with a support worker. His current personal assistant, Catherine, who supported him to make his most recent will, helped him to tell the story of both of these wills. We have used Gareth's words whenever possible.

Box 4.3: Gareth's story

Gareth told us that "My grandmother, when I was living with her before she died, she always said about 'I'm not always going to be there.' And I took it on board thinking well I know she's not always going to be there because once she gets older and so on, life changes. And that started getting me thinking about little bits in between. And then how I started it was I was given some backdated money from the benefits agency, like an arrears-type thing. And it started me thinking about doing the will seriously. Thinking why squander something which I would never have had in the first place, but what do I put it to use of, and instantly I thought about a funeral plan and my will."

Gareth subsequently paid for a funeral plan, and made a will with the support of his support worker. Time passed, and Gareth's relationship with the support worker who had previously helped him to make his will broke down, with some questions around possible financial abuse.

Later, when he was moving house, he and his PA, Catherine, found his will, which Gareth had forgotten he had made. In discussion, it turned out that Gareth had misunderstood, or had been misled, about the law relating to wills. He thought that he had to name his 'next of kin' in his will, and that he had to leave everything to that next of kin.

As Catherine said, "at the time he went with support but the support worker was the person who was benefitting from this. …If easy read [information] had been there he would have then got the right information and have had time to have processed that information perhaps before. And then the mishap that was made because Gareth didn't truly understand what was going on, wouldn't have happened would it?"

Gareth: “I also seem to remember, I asked the person to be my next of kin and yeah I think I was probably misguided in that thinking that was a [requirement]…. I have to say I did misunderstand so I’m going to put in that point. I did misunderstand because I wouldn’t have been-”

Catherine: “It was really upsetting. When I tried to- when we found the will and we went over it he was really frustrated and got quite upset, because it was [upsetting].”

More recently, Gareth made a new will, with support from Catherine, another support worker and a solicitor. He named both support workers as executors, and decided to leave all of his estate to charity. Initially, he had wanted to name only Catherine as his executor, but she persuaded him to name another person as well “not only to safeguard Gareth, but to safeguard me really.”

Gareth said, “I’m happier now that I’ve actually done it properly with the right advice. But it does make me wonder, you know, if that advice had been given to me correctly in the first place, as Catherine was saying, I’d probably have a better understanding.”

Gareth was also advised by his solicitor to write a letter accompanying his will explaining why he didn’t want to leave anything to his family, as he was concerned that his family, who he does not see, and who have not supported him during his lifetime, would try to “cash into” his estate. He was supported by Catherine and by the solicitor to include details of his poor relationship with his family with his will, to protect his charitable bequests, even though this was difficult for him to do.

Gareth’s story raises important issues about how best to safeguard vulnerable testators from abuse; the potential problems that the default intestacy rules may raise where disabled people are estranged from their families; and the need for accessible information about wills.

Gareth’s story warns of the potential consequences when safeguards are not successful in protecting a person from abuse. Balancing the right to enjoy legal capacity with the importance of safeguards from abuse is one of the major challenges of introducing a CRPD compliant legal framework. Gareth’s story demonstrates how the current approach does little to safeguard vulnerable testators at the time they make their will, relying instead on protections against challenges to the will after death. The current approach to testamentary capacity, in conjunction with the safeguards relating to undue influence appear to have failed to protect Gareth when he was making his first will.

Without having been present at the appointment with the solicitor where Gareth nominated his previous support worker as his 'next of kin' and sole beneficiary, we cannot know to what extent his solicitor probed Gareth's understanding of wills, or his testamentary capacity more broadly. We also do not know whether Gareth was questioned about his wishes without his supporter present (as would be considered good practice where testamentary capacity is in doubt) (The Law Society, 2013). It seems, however, that whilst Gareth understood the nature and effect of a will (insofar as it is a disposition of his assets that takes effect after his death), and the extent of the property he was disposing of in that will, it appears that he misunderstood (or was misled about) "the claims to which he ought to give effect".[80] It is possible, therefore, that his original will may have been vulnerable to challenge, had he died whilst it was his last will.

The difficulties disappointed beneficiaries may face in challenging a will on the basis of incapacity, lack of knowledge and approval, mistake, fraud or undue influence are well documented (Kerridge, 2016; Law Commission, 2017a). It is unlikely here that a challenge on the ground of lack of knowledge and approval would be successful, given evidence that Gareth did, at the time he executed it know of the content of his will, and approve of it.[81] In respect of testamentary capacity, it seems clear that Gareth has capacity under the *Banks v Goodfellow* test, and under the MCA test in relation to his new will, which suggests he would also have had it at the time he executed his original will, even if not all of the relevant information was given to him. Given that the will was prepared by a solicitor, it is likely that some contemporary evidence would be available that he had capacity at the time the will was executed.

In any case, it seems inappropriate (in light of the CRPD) to consider that a challenge based on Gareth's disability should be the way to bring down a will that has been made as a result of the influence of, or misinformation provided by, a supporter. The question that would have been at heart of any potential challenge to his previous will on the basis of capacity would be the extent to which he understood the concept of testamentary freedom, and that he could leave his assets to whomever he chose, bearing in mind that he has no dependents who might have a claim under the family provision legislation.[82] The final grounds for challenge would be that of undue influence and/or fraud, but again these are difficult to evidence, and in the absence of sufficient evidence, the challenger may be required to pay costs. Undue influence requires coercion, rather than mere persuasion. Fraud requires that the testator was deceived. In both cases, the burden of proof rests on the challenger to evidence the deception or coercion, which would have been very difficult to do in this case.

[80] *Banks* v *Goodfellow* (1870) LR 5 QB 549.

[81] *Hastilow v Stobie* (1865) LR 1 PD 64; *Guardhouse v Blackburn* (1866) LR 1 PD 109.

[82] Inheritance (Provision for Family and Dependents) Act 1975.

Importantly, however, even if a person who would have been in a position to challenge Gareth's will had been successful in doing so, intestacy law would still have failed to give effect to Gareth's wishes. The only persons who would have standing to challenge the will would be those who would otherwise have benefited should Gareth die intestate. As is clear from Gareth's story, he does not want his birth family to inherit from him. Like several of the other Everyday Decisions interviewees, Gareth does not have a positive relationship with his biological family. The only family member that Gareth spoke positively of was his grandmother, who died some years ago. Whilst the rules on intestate succession are designed to offer an appropriate backstop position for most people, and generally align quite well with generic public attitudes to inheritance (Douglas et al., 2011; Douglas et al., 2010; Humphrey et al., 2010), they may not always be appropriate for intellectually disabled people. This is because the family relationships of intellectually disabled people, particularly those with lifelong learning disabilities, may not follow the same patterns as those of non-disabled people. For example, some intellectually disabled people (particularly older people) may have spent parts of their lives in residential institutions (Hatton, Emerson, Glover, & Brown, 2016). Intellectually disabled people may also be less likely to have spouses or partners, because they are not well supported to develop positive intimate relationships (Harding & Taşcıoğlu, 2017), may be at higher risk of sexual abuse (Lindsey, 2016), and may not receive the sex education required to meet the threshold for capacity to consent to sex under the MCA.[83] Intellectually disabled people may also not have children because they have been sterilised (Stansfield, Holland, & Clare, 2007), or if they do have children, their children may have grown up in foster care, or may have been adopted (Dimopoulous, 2009). As a consequence, the standard patterns of inheritance, and the rules of intestate succession may not fit with disabled people's lives.

Gareth did not say precisely when his first will was made, so we do not know whether the MCA 2005 was in force at the time. He did note, however, that no easyread information about will-making was available to him to help him to make decisions about his will on either occasion. As a result, during the interaction with the solicitor, Catherine acted as a kind of translator between the solicitor and Gareth.

> **Gareth:** When I say about having good support with me, having people that know me well and know how, they know when they talk to me. Like Catherine, so Catherine was doing just there, it's actually understanding that. So if I didn't understand them, Catherine was picking it up and she-
>
> **Catherine:** It's a bit like translating wasn't it? So it's-
>
> **Gareth**: -she would explain it much better in simple terms.

[83] *Re CH (by his Litigation Friend, the Official Solicitor)* v *A Metropolitan Council* [2017] EWCOP 12.

> **Catherine:** Yeah. I mean I would say to them, you know, I would say, "sorry can you simplify it?" And then I would, if Gareth was still struggling, I would simplify it to how I thought he would best understand it. And that's how we got on didn't we. So it was a bit of them. A bit of it they could have done better. But what they couldn't explain I went over.

Gareth also suggested that, as well as having easyread information available, it would be helpful for solicitors to have training in how to communicate better with disabled clients, because solicitors cannot know in advance of meeting with a client what their needs might be. As Gareth said, "They don't know you until you walk in that room. They don't know who's going to be supporting you, yeah? They know that, at some stage, well they don't know I was going to struggle".

4.2.3 SUMMARY

By exploring these two case studies, we have highlighted how disability can make a difference in inheritance matters, such that there may be a justification for greater support to be available to disabled testators than is provided for by the current law. Disability can make a difference both in terms of the potential for disabled people to have greater needs, and for disabled people to have complex relationships with their birth family. Not all aspects of will-making by disabled people are different, however, and disabled testators also raised issues common to many in contemporary society: the need to keep wills under review to respond to life events, and the complexities of blended families and second marriages. It is important, therefore, just as it is with every testator, that disabled people's wills are kept under review, and amended where appropriate. Bearing in mind the significant costs associated with preparing statutory wills, the need for flexibility and review requires us to think carefully about how best to support will-making by intellectually disabled people.

Finally, our two case studies highlighted how supported decision-making currently happens in the context of wills. Intellectually disabled people often want and need to make a will, demonstrating the need for trusted support, accessible information, and other safeguards for vulnerable testators. Penny's story highlighted the need for support from both family and an independent advocate; Gareth's story made clear the problems that can occur where people are misled or misinformed by their supporter. Review of the law of wills offers an opportunity to re-think support for people with disabilities in exercising their legal capacity to make a will. In the next chapter, we explore the guiding concepts that we consider should shape any reform in this area, with reference to our empirical research.

4.3 CONCLUSIONS

In this chapter, we have outlined the practical issues that arise in relation to wills and will-making by people with intellectual disabilities, and in care and support professionals' experience and perceptions of supporting will-making. The practical issues we have

explored included a lack of knowledge and understanding about wills and will-making within the frontline care and support workforce, which results in a gap in the availability of informal, introductory information and advice about making a will.

We also highlighted through this analysis a gap that has emerged between intestacy and statutory wills for intellectually disabled people who would require support to make their own will. The high costs associated with statutory wills means that this framework may not be appropriate to cater for the testamentary wishes and choices of intellectually disabled people with modest estates. The disability difference that we identified through our analysis (both to the ways that disability disrupts normative patterns of inheritance in families, and the potential for disabled people to have smaller or less usual family relationships as a consequence of institutional and regulatory aspects of care) further complicates the normative patterns of and attitudes to inheritance that shape intestacy rules. We will suggest how we think this gap between intestacy and statutory wills could be addressed in Chapter 6.

Finally, three key elements of supported decision-making in the context of wills emerged in this chapter: the need for trusted support, accessible information and robust (but not intrusive or discriminatory) safeguards. If intellectually disabled people are to be supported to make their own wills, any support framework will need to have these concepts at its heart. We discuss these in more detail in Chapter 5.

KEY FINDINGS:

5. **Disability can make a difference to usual patterns of inheritance.**
6. **Frontline care and support professionals have limited awareness of how to make a will and do not feel confident supporting service users in this area.**
7. **Intellectually disabled people would like to be supported to make a will that reflects their wishes and preferences.**
8. **Intellectually disabled people said that solicitors were not always good at communicating information about wills in accessible ways.**

RECOMMENDATIONS FOR REFORM:

3. **Training for frontline care staff and statutory advocates on the importance and practicalities of will-making is required to better support testamentary choices.**
4. **Training for legal professionals who provide will-making services (including solicitors, legal executives and will-writers) on effective communication with people with intellectual and sensory disabilities is needed to ensure legal services are accessible.**

CHAPTER 5. GUIDING CONCEPTS FOR REFORM

In addition to aligning with current domestic approaches to capacity law, any reform to facilitate supported will-making should be designed to ensure compatibility with the rights protected by the UN Convention on the Rights of Persons with Disabilities (CRPD) whenever it is possible to do so. The particular CRPD rights that are engaged here include Article 5, equality and non-discrimination; Article 9, accessibility (particularly in relation to information and communication); Article 12, equal recognition before the law; and Article 21, freedom of expression and opinion and access to information. Also of particular importance to supported will-making are the guiding principles of the Convention, which include the freedom to make one's own choices, non-discrimination, accessibility and respect for difference.[84]

From this research, we identified three guiding concepts, which we argue should be at the heart of any reform to support will-making by disabled people. Sufficient attention to these guiding concepts will facilitate and enable alignment with the principles and substantive Articles of the CRPD. These concepts are: trust, communication, and accessibility. We consider each of these concepts in turn. We then provide a more detailed set of suggestions for how current and proposed safeguards could work together with these guiding concepts in a new supported will-making scheme. Whilst much of our focus in this research and in this report is on people with cognitive impairments (like learning disabilities, brain injury or dementia and other neurodegenerative disease), the safeguards and support we discuss are often relevant to other disabled people, particularly those with sensory impairments and with psychosocial disabilities. Importantly, as we move to consider how best to support people to make testamentary choices, we wish to ensure that any approach to safeguarding disabled people from financial abuse when making a will needs to operate in a way that empowers disabled people to use their rights to enjoy legal capacity, on a non-discriminatory basis.

5.1 TRUST

Perhaps the single most important issue in supporting decision-making about testamentary choices is ensuring that the testator can trust those who support them to make decisions. This means that disabled testators should have a choice about who gives them support, and particularly to refuse support from those they do not trust. It also means that proportionate, appropriate and effective safeguards need to be in place to protect vulnerable testators from abuse and coercion. In the current law of wills, trust is ensured through the operation of the doctrine of undue influence, protections against lack of knowledge and approval and mistake, and the potential to challenge suspect wills made by vulnerable testators. As discussed in part 3.4, a key problem with all of these frameworks is

[84] Article 3, UN CRPD.

that they only come into operation after the testator's death, where a disappointed potential beneficiary challenges a will through the courts. These doctrines do little to help disabled people guard against financial abuse at the time they make a will. Further, the "golden rule" which encourages legal professionals to gain medical certification of testamentary capacity is a best practice guideline, rather than a formal requirement.[85] It is also formulated in a discriminatory manner, highlighting additional steps to be taken when a testator is "aged" or has "suffered a serious illness."[86]

Finding ways to ensure that disabled people can be supported by a trusted supporter to make a valid will, whilst also ensuring that there are appropriate and effective safeguards against abuse must, therefore, be a guiding principle in reform in any new legal framework for making a will. This is particularly important if any changes to the law are to comply with the United Kingdom's responsibilities under Article 12 of the UN CRPD.

As we outlined above, family members, support workers, independent advocates and legal professionals may all currently have a role in supporting disabled people to make a will. Many people who make wills also do so with the support of charities, particularly if they intend to leave a bequest to that charity. One issue about trust that we have not yet discussed concerns the possibility for a conflict of interest to arise where a person working for a charity named as a beneficiary is the person acting as a supporter. This might be particularly likely to happen where people decide to leave their estate to a charity that has helped them. A disabled participant, Luke reflected on this issue:

> [if a] support worker [helped you] I could see that at some points being conflicts of interest if you decide to leave the money to the place where the support worker is working for. That would be a big conflict of interest. There'd be a lot of people saying, "hang on a minute but they used to work for them, how comes you're leaving your money to them?" I wouldn't want that because that's a really uncomfortable thing for us. Both sides, the people that are supporting us and us getting the support, would make us feel even more uncomfortable about supporting the person in the first place. (Luke)

The challenge here, however, is that charitable giving, both during life and through testamentary bequests is often founded in feeling a connection to a specific charity, particularly if it is a charity that has helped a person during their lives.

By way of example, another disabled participant, Rebecca, who has no family, told us that if she made a will she would want to leave her money and furniture to two charities, a self-advocacy charity that she has been involved with for a long time, and a charity furniture shop that she works in as a volunteer. These charities are meaningful to her, and so she

[85] *Sharp v Adam* [2006] EWCA Civ 449, [2006] WTLR 1059; *Burns v Burns* [2016] EWCA Civ 37.

[86] *Re Simpson* (1977) 121 SJ 224.

would like to use her will, if she were to make one, to support them because they have supported her. Rebecca had not, at the time of the interview, made a will. She had, like Gareth, invested in a funeral plan, setting out her wishes for her funeral and other end of life choices. She was clear that she would like to make a will, but felt that she would need a lot of support to do so.

Rather than waiting for a will to be challenged, reform that facilitates supported will-making could effectively embed 'trust' as a guiding concept. We consider that there are several ways that safeguards to protect disabled people from abuse of trust when making a will could be built into law in a way that works better for disabled people, and is less discriminatory, than the current balance of the *Banks* v *Goodfellow* test for testamentary capacity in combination with the 'golden rule'. For example, a revised statutory MCA Code of Practice could be produced which gives explicit guidance to solicitors about how to protect clients against undue influence and financial abuse in will-making. A more formal approach could be taken through a 'supported will' scheme. This could be set up to act as a bridge between the current intestacy provisions and expensive statutory wills for those with impaired capacity. Alternatively, a nominated supporter scheme could be introduced, building on models currently available in other jurisdictions. We return to discuss each of these options for reform in more detail in Chapter 6.

5.2 COMMUNICATION

Effective communication is vital to all kinds of supported decision-making, and this is reflected in the MCA Code of Practice (Department for Constitutional Affairs, 2007). Our Everyday Decisions research (Harding & Taşcıoğlu, 2017, 2018), however, found that the current approach to communication under the MCA 2005 and the Code of Practice 2007 is only reliable in supporting people to make everyday choices about things like food, clothing or daily activities. For more complex decisions, including medical, financial and legal decisions, frontline care staff were more likely to fall back on determinations of incapacity and make substitute decisions under the best interests framework.

The issue of communication came up frequently in this research and there was a particular emphasis placed by participants on support techniques used to cater for effective communication, technology used to ease the process of communication and the importance of advocacy. The issue of communication within the context of supported decision- and will-making extends far beyond our basic understanding of clear and effective spoken and written language.

Effective communication support techniques further include: careful listening, taking time, being aware of the temporal and spatial dimensions of decision-making, and making use of appropriate visual and technological aids, including high-tech communication technologies like eyegaze, and providing easyread versions of information. Some of the examples we heard, particularly those from care professionals who support people with brain injury (see

section 4.1, above) suggest that careful listening and attentiveness to wishes and preferences might require repeated interactions, on different days, and at different times. This creates additional layers of complexity in relation to making a will, because the relatively high cost of legal professional time would often make it too expensive for a legal professional to facilitate these decisions. Yet communication about wills and will-making within care contexts is particularly challenging, due to the technical nature of will-making, and a general lack of confidence from frontline care professionals in supporting their service users to make a will.

One solution to this communication challenge is through training in both the care sector and for legal professionals. For frontline care staff, training in why it is important to make a will, the kinds of decisions that need to be made when writing a will, and how to talk to disabled people about wills and testamentary choices would be extremely valuable. Training of this nature could help to build confidence and go some way towards addressing the barriers to providing information about and support for will-making we have identified.

Research consistently shows that many adults in the UK do not have a valid will, and even though the proportion of those with a will increases with age, a large minority of those over the age of 55 do not have a will (Macmillan Cancer Support, 2018). One explanation given for this is a general lack of knowledge and understanding about wills, another is that people assume that because they have limited assets a will is not necessary. Both of these views were expressed by participants in this research, highlighting the need for training in the importance of wills in both facilitating the winding up of a person's estate, and in the potential complexities of doing so where people die intestate, or do not have close family members. Training for frontline staff might also have an added beneficial effect on general public awareness and understanding of the benefits of making a will.

For legal professionals, training in how to communicate well with disabled people, particularly those with intellectual, psychosocial and sensory impairments would also be helpful. This kind of training, which could potentially form part of Continual Professional Development, might helpfully also lead to some form of qualification or accreditation, to help disabled people make informed choices about which legal service provider to turn for help with wills. There are, of course, practice notes on, for example meeting the needs of vulnerable clients,[87] and financial abuse[88] provided by the Law Society. Our sense, however, is that more hands-on training might be valuable in helping legal practitioners to become better at interacting with disabled clients. Not only would this obviate the need for

[87] https://www.lawsociety.org.uk/support-services/advice/practice-notes/meeting-the-needs-of-vulnerable-clients-july-2015/

[88] https://www.lawsociety.org.uk/support-services/advice/practice-notes/financial-abuse/

'translation' as discussed by Gareth and his supporter, Catherine (see section 4.2.2, above), it would have the further benefit of increasing access to justice for disabled people.

5.3 ACCESSIBILITY

The final concept that we consider essential in thinking about supporting will-making by intellectually disabled people is accessibility. There are two elements to our consideration of accessibility here: accessible information about wills and will-making, and affordability of accessing legal advice and support.

Issues relating to physical accessibility have become relatively well embedded in law and in wider society, as duties to provide access to buildings or premises for people with mobility impairments have appeared in law since the Disability Discrimination Act 1995.[89] Accessibility of information, however, lags far behind physical accessibility. Since the Equality Act 2010 came into force, there has been a single threshold for the duty to make reasonable adjustments to facilitate access by disabled people. This is where a 'provision, criterion or practice', a 'physical feature', or lack of access to 'an auxiliary aid' would place the disabled person at a 'substantial disadvantage'.[90] This duty extends to both physical accessibility and accessible information, but whereas the need for reasonable adjustments to accommodate disabled clients with mobility and sensory impairments is covered in the relevant Law Society practice notes, our research has uncovered much less by way of accessible information to support legal choices.

As well as being explicitly engaged in domestic law through the reasonable adjustments provisions in the Equality Act 2010, accessibility of information is also protected by Article 9 and Article 21 of the UN CRPD. Article 9 relates to all kinds of accessibility, both physical and informational, and places an obligation on States parties to take appropriate measures to identify and eliminate obstacles and barriers to accessibility, including in the provision of 'facilities and services' to the public by private entities. Article 21 focuses on freedom of expression, and "freedom to seek, receive and impart information and ideas on an equal basis with others."[91] Finally, the Public Sector Bodies (Websites and Mobile Applications) Accessibility Regulations 2018[92] came into force on 23 September 2018, implementing the EU Directive on the accessibility of the websites and mobile applications of public bodies 2016.[93] This directive places obligations on public bodies to ensure accessibility of information accessed online and through mobile phone applications. Notwithstanding any potential future departure from EU rules, this patchwork of legal provision from the last

[89] Disability Discrimination Act 1995, s. 21;

[90] Equality Act 2010, s. 20

[91] UN CRPD, Article 21

[92] SI 2018/852

[93] EU Directive 2016/2012

decade points towards an important shift in attitudes towards accessible information that needs to be reflected in access to law and justice.

The issue of accessible information is being taken forward in innovative ways in health and social care contexts. A legal duty to meet the 'accessible information standard' was introduced for NHS and adult social care services in 2016 (Rafi, Sullivan, & Mathers, 2016). This information standard,[94] which rests on a statutory power under the Health and Social Care Act 2012,[95] requires all organisations that provide NHS care and/or publicly funded adult social care to carry out five distinct steps to ensure that all services users receive "information in an accessible format and any communication support which they need" (NHS England, 2017, p. 16). The relevant steps towards meeting accessible information needs include steps to identify needs, consistently record information and communication needs, using 'flags' in records to highlight accessible information needs, and sharing needs across health and social care services. As this is a relatively new requirement, limited evidence has emerged to date about the difference that it makes in supporting disabled people to make their own healthcare choices, though it is anticipated that compliance with the accessible information standard could help to facilitate self-management and shared decision-making in healthcare (Rafi et al., 2016).

Accessible information is less clearly available, or supported, in legal services than it is in health and social care. Yet the need for accessible information about wills was clearly articulated in Gareth's story (see Chapter 4.2.2, above), where the lack of easyread resources to support him contributed to his misunderstanding of testamentary freedom, and left him vulnerable to financial abuse. Some accessible information about law, for example, a book series about using the criminal justice system,[96] is available, and various easyread guides to the Deprivation of Liberty Safeguards are available online. Limited information about wills is available in easyread formats from charities,[97] but there is little discussion of the importance of accessible information on the websites of the Law Society, Solicitors Regulatory Authority, Chartered Institute of Legal Executives, Institute of Professional Will-Writers or the Society of Will-Writers.

There is scope for the creation of more freely available accessible information about law and justice issues, and where legal services are provided through legal aid, there is likely to be an argument for a public sector information duty, similar to the one that applies to

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[94] DCB1605: Accessible Information, available at: https://digital.nhs.uk/data-and-information/information-standards/in#formation-standards-and-data-collections-including-extractions/publications-and-notifications/standards-and-collections/dcb1605-accessible-information accessed on 26 November 2018.

[95] Health and Social Care Act 2012, s. 250

[96] See, for example, https://booksbeyondwords.co.uk/book-sets/criminal-justice-book-set

[97] For example, a resource produced by Mencap is available here: https://www.mencap.org.uk/sites/default/files/2016-06/Mencap%2527s%20Accesible%20guide%20to%20making%20a%20will.pdf

healthcare. Importantly, however, will-writing is generally a private client service, which is funded by the person making a will. At present, the potential additional costs of support for will-making by intellectually disabled people, such as having a supporter present, having additional or longer appointments with legal professionals, or instructing an independent advocate, are borne privately by the person making the will.

This leads us to the second dimension of accessibility: costs. The cost of making a will with legal advice is a disincentive to many in making a will.[98] Disabled participants in this research were particularly concerned about the balance between cost and benefit of a will. As Luke said:

> Yeah when you've only got a couple of hundred pounds to give someone, using all of that to make a will is a bit redundant really, isn't it? Yeah. It's the funding part. Because if a person, as you say, couple of hundred pounds for a will … And that's a cheap one. So the people that are in that position we don't, a lot of us don't have that kind of cash in the first place. Especially if we don't have the assistance that we should be getting because of budget cuts and everything else, we're having to spend more of our own money to do the things, just the normal things. (Luke)

Whilst charitable initiatives like 'free wills month'[99] or 'will aid'[100] can support people to make a will at low or no cost, these charitable schemes are not currently aimed at supporting intellectually disabled people, and their websites do not include easyread resources. Furthermore, the costs of a statutory will are much higher than even the highest figures quoted by the money advice service. According to the Law Commission 'Making a Will' consultation, "statutory wills usually cost over £5000 in legal fees and can cost multiples of that amount" (Law Commission, 2017a, p. 57). As a result, it appears that intellectually disabled people may be at a significant disadvantage in respect of making their will.

5.4 SAFEGUARDS

In order to tie together our guiding concepts of trust, communication and accessibility, we consider here in greater detail the importance of safeguards in any reform of the law relating to supported will-making. We discussed the current legal framework for challenging wills made by vulnerable testators at in Chapter 3.4 above. Here, we reflect on reform proposals regarding knowledge and approval, undue influence, limits on supporters as beneficiaries, and fiduciary relationships put forward by the Law Commission, alongside the

[98] According to the Money Advice Service, a simple will can cost between £144 and £240; a complex will between £150 and £300 and a specialist will can cost between £500 to £600.

[99] https://freewillsmonth.org.uk/

[100] https://www.willaid.org.uk/

requirements for effective safeguards to prevent abuse in Article 12 CRPD, in light of our empirical findings.

As well as setting out the right to equal protection under the law, Article 12 CRPD is explicit, in Article 12(4), that disabled people are entitled to safeguards to prevent abuse, but that safeguards must also "respect the rights, will and preferences of the person, be free of conflict of interest and undue influence," be "proportional and tailored to the person's circumstances" and apply for the shortest time possible. Further detail about the shape of the required safeguards were provided by the CommitteeRPD in their General Comment on Article 12, which also provides detail about the requirements for supported decision-making schemes (Committee on the Rights of Persons with Disabilities, 2014).

Much of the commentary about safeguards under Article 12 has been focused on the CommitteeRPD's declarations that best interests decision-making is not compatible with Article 12, and that guardianship regimes are similarly non-compliant with the Convention (see e.g., Arstein-Kerslake & Flynn, 2016, 2017; De Bhailis & Flynn, 2017; Devi et al., 2011; Martin et al., 2016; Quinn, 2010). Less attention has been paid to the implications of the CRPD for creating safeguards to protect disabled people from abuse. The General Comment does, however, give some guidance to aid interpretation of this part of Article 12, setting out specifically that "safeguards must provide protection from abuse on an equal basis with others," that they must "include protection against undue influence" that respects "the rights, will and preferences of the person, including the right to take risks and make mistakes" (Committee on the Rights of Persons with Disabilities, 2014 at [22]). Importantly, the Committee also make clear that "the goal of the safeguards is to ensure that the person's will and preferences are respected" in any supported decision-making framework, which acts as an important reminder that safeguarding measures should not be overly restrictive of the rights and freedoms of the disabled person.

As discussed briefly in part 3.4 of this report, and in more detail in the Law Commission consultation on Making a Will (Law Commission, 2017a), the key current approaches to safeguarding vulnerable testators from abuse are found in the doctrines of undue influence, want of knowledge and approval, alongside general safeguards stemming from the test for testamentary capacity, formalities requirements, and the need for witnesses. The Law Commission also discussed some specific new safeguards where a formal supporter helps a disabled person to make a will, in the form of limitations on who might be able to inherit, and through the imposition of a fiduciary relationship. We discuss each of these in turn.

5.4.1 UNDUE INFLUENCE AND KNOWLEDGE AND APPROVAL

In Chapter 7 of the Making a Will report, the Law Commission propose a new statutory doctrine of testamentary undue influence, which would place the narrower interpretation of the scope of knowledge and approval on a statutory basis. The proposed new doctrine of testamentary undue influence would create a presumption that a relationship of influence exists in respect of gifts by the testator to trustees, medical advisers, any person who prepares their will for remuneration and professional carers. Gifts to these categories of beneficiary that also call for an explanation would then raise a presumption of undue influence that would need to rebutted.

Without getting into the intricacies of the provisional proposals, the benefits of this approach to undue influence can be seen in relation to Gareth's case study (see Chapter 4, part 4.2.2). As discussed above, Gareth's first will, which he was supported to make by a paid carer and a legal professional, included a gift to the paid carer. Gareth knew and approved of the content of the will at the time that it was made, though he misunderstood the extent of his testamentary freedom. He did however have testamentary capacity at the time of making both his first and second wills. Challenging Gareth's first will would have been very difficult under the current law. Gareth's situation would be captured by the proposed reforms.

Creating a presumption of testamentary undue influence in this situation would not only make it easier for the will to be challenged, but it would also act as an additional safeguard at the point the will was drafted. If a new statutory presumption of testamentary undue influence were created, then it would be expected that solicitors or other professionals preparing a will would raise the question of undue influence. It would then be necessary to take steps to ensure that there was, in fact, no undue influence, and that appropriate evidence to that fact be recorded at the time of drafting and execution of the will. The proposed statutory clarification of knowledge and approval, which would sit alongside the new statutory doctrine of testamentary undue influence would help to clarify the scope of different possible challenges to the will. Conceptually, this is positive, because it would shift the focus of the challenge away from Gareth's disability and towards the questionable behaviour of his personal assistant.

Alongside these specific safeguards which relate to challenging suspicious wills, generic safeguards are created through the formalities requirements, including the need for witnesses. Of particular importance in relation to wills made by intellectually disabled people is the question of testamentary capacity. We discussed testamentary capacity in depth in Chapter 3, and therefore do not discuss it in detail here, except to reiterate our concern that safeguards should not be discriminatory on the basis of disability, nor hold intellectually disabled people to higher standards of decision-making than others.

5.4.2 SAFEGUARDS FOR SUPPORT RELATIONSHIPS

Supported will-making raises three specific issues that do not arise where a person makes a will without support. Firstly, there is the question of whether a supporter should be able to benefit under a will at all. Second, there is the question of what kind of relationship should be created between the supporter and the testator, and specifically whether this should be a fiduciary relationship. Third, there is the question of whether wills made with the assistance of a supporter should have additional formalities associated with them, such as certification of testamentary capacity.

In their consultation paper, the Law Commission provisionally suggested that in line with the position for witnesses, a supporter, and their spouse, civil partner, cohabitant and potentially other family members, should not be able to benefit under a will made with their support (Law Commission, 2017a). Whilst this would be a straightforward approach, our research complicates this picture somewhat.

Firstly, freedom of choice is a fundamental principle in the CRPD. This includes the freedom to choose who provides support. In General Comment 1, the CommitteeRPD (2014) were clear that supporters should be chosen by the disabled person, rather than appointed by a third party, and that the goal of safeguards is "to ensure that the person's will and preferences are respected"(Committee on the Rights of Persons with Disabilities, 2014). As a result, any support scheme that is created (whether specifically in relation to wills, or as a more general nominated supporter scheme) needs to be sensitive to the freedom of the disabled person to choose their supporter.

Given the importance that disabled people place on longstanding relationships with supporters and the central importance of trust in a support relationship, it is likely that a testator who had been supported by someone for a long time in their life might want to remember that person in their will. This therefore points away from tight restrictions on supporters being named as a beneficiary under a will, as this may be unduly restrictive of the will and preferences of the testator.

There is, however, a clear potential conflict of interest that arises where a supporter is also a potential beneficiary under the will. This conflict would be particularly acute in the case of family members who act as supporters. Just as Article 12 of the CRPD places emphasis on choice in relation to support frameworks, conflict of interest is highlighted as a specific problem to be safeguarded against in Article 12(4). The question is whether the appropriate response to this is a provision that only applies to disabled people who make a will, or whether the potential conflict can be appropriately guarded against under the usual rules relating to testamentary undue influence.

It is likely, as we discussed in Gareth's case study, that the current approach to testamentary undue influence and knowledge and approval would be insufficient to

safeguard disabled testators from this potential source of abuse. However, if the proposed new statutory doctrine of testamentary undue influence were to be introduced, we think that it would be appropriate to add "supporter" to the list of relationships of influence that, along with a gift that calls for an explanation, gives rise to a (rebuttable) presumption of testamentary undue influence. This may well be sufficient to protect testators, without adding an additional (potentially discriminatory) complication to testamentary freedom for intellectually disabled people.

The Law Commission consultation paper also raised the question of whether a fiduciary relationship should be created between a supporter and the person they support. Our empirical research did not address this question directly, however, we think that the underpinning concept of trust suggests that a fiduciary relationship should be imposed on formal supporter-supportee relationships. A fiduciary relationship would mean that the supporter must not use their position for personal benefit, take advantage of their position, or put themselves in a position where their interests conflict with those of the person they are in a fiduciary relationship with.

Attorneys appointed under a Lasting Power of Attorney, and Deputies appointed by the Court of Protection under the MCA are in a fiduciary relationship with the donor or protected person. In contrast, persons providing informal support under the MCA do not owe fiduciary duties to the person they support, nor do advocates. Again, this is a complex legal issue, but one which could be resolved were support relationships to be placed on a more formal legal footing.

Thinking back to the two case studies we discussed in Chapter 4, Penny and Gareth, there were several support relationships at play in each of their cases, including paid personal assistants, independent advocates, family members and legal professionals. Whereas the duties of legal professionals to their clients are clear, the lack of clarity around the formal legal duties of informal supporters and disability personal assistants towards the persons they support are much less clear. We do not think that it would be appropriate to impose fiduciary duties on all people offering informal support. It would, however, be possible to do so under a formal nominated supporter scheme. Such a scheme could make these duties clearer, for the benefit of all parties, and help ensure that safeguards against conflict of interest and undue influence are proportional and tailored to the individual's circumstances. We consider that it would be appropriate to impose a similar fiduciary duty on formal supporters nominated under that kind of scheme as currently applies to attorneys and deputies.

The final specific safeguarding issue that supported will-making raises is a question about whether it would be helpful to include a formal requirement for certification of capacity, like that which applies in relation to Lasting Power of Attorney under the MCA. The certification requirement for LPAs requires everyone making an LPA to include certification of their capacity to make the agreement. The certificate can be provided either by a professional

who has the relevant skills or expertise to assess capacity for the purposes of an LPA, or by a person who has known the donee for at least two years.

In the context of wills, a certification requirement would have the potential to protect wills from challenge on the basis of testamentary capacity. It would not have a particular impact on undue influence or conflict of interest between the supporter and supported person. It would be discriminatory to only require disabled people to provide a certificate, so if this approach were taken, the requirement would have to apply to all wills. This would inevitably increase the costs and complexities of making a will, and is therefore unlikely to be a positive step to take. There is also research evidence to suggest that the certification process causes problems for people when seeking to make LPAs under the MCA (Harding, 2017a; Harding & Peel, 2018). There is one potential exception, which we discuss at part 6.1.2 below, where a certification scheme might be potentially helpful if combined with a formalised accessible will template.

In Chapter 6, we outline policy options for supporting will-making by intellectually disabled people, including our overall recommendation that a formal nominated support scheme would be the optimal approach to ensure disabled people have access to the kind of support they require in all aspects of life, backed up by appropriate, and CRPD-compliant, safeguards.

5.5 CONCLUSIONS

In this chapter, we have set out three concepts which we consider must be at the heart of any reform of the law relating to supported will-making. These are trust, communication, and accessibility.

In terms of trust, we consider that any reform of the law of wills should include mechanisms to encourage intellectually disabled people to make wills, and for them to be supported by people they trust to do so. In addition to providing mechanisms to challenge suspicious wills under the principles of lack of knowledge and approval or undue influence, we also think that the principle of trust should underpin mechanisms that help to protect intellectually disabled people from having their wills challenged unnecessarily. Whilst the statutory will serves this purpose for a person who lacks testamentary capacity, it is not an appropriate solution for many people due to the very high costs associated with this testamentary form.

Communication is already a major component of supported decision-making under the MCA. From this research, however, we think that there are ways that communication between disabled people, those who work with and support them, and solicitors, legal executives and others who support people to make wills can be improved. Specialist training for both legal professionals and care and support professionals in relevant areas could go a long way towards making wills more accessible to intellectually disabled people. Communicating effectively with people with disabilities can require particular skills and

approaches, which are not usually covered in legal training. Similarly, supporting intellectually disabled people to make a will involves understanding what will-making involves, information which is not routinely provided in health and social care training. Greater attentiveness to ways of communicating would help to ensure that disabled people have the information required to be able to make a will.

Another avenue for supporting communication is through the development and provision of accessible information about making a will. This also connects to developing rights to accessible information protected by domestic equality law, EU law and international human rights law. We also discussed the disadvantage experienced by intellectually disabled people in terms of the financial accessibility of will-making. Our empirical research has shown that some intellectually disabled people have fractured relationships with their family, and many do not have spouses or children of their own. Their lives and relationships may not, therefore, be fully reflected in the rules for intestate succession, as those rules were designed to suit normative patterns of inheritance and family life. Given that intellectually disabled people may not want the (possibly distant) relatives who would be likely to inherit their estate if they die intestate to inherit, there is a potential gap in the law for those with impaired capacity and modest means. This gap is particularly acute where a person does not have an estate of the kind where a statutory will would be appropriate, but who would need support to reach the threshold of understanding required for testamentary capacity.

Finally, we considered safeguards that could be included in any reform of the law of wills to better protect intellectually disabled testators. We highlighted that reform needs to ensure that appropriate and effective safeguards are in place to protect intellectually disabled testators from abuse, conflict of interest and undue influence. As well as providing empirical justification for the introduction of a statutory doctrine of testamentary undue influence, we outlined the potential benefits of formalising support and the imposition of fiduciary duties on formal supporters.

KEY FINDINGS:

9. Intellectually disabled people rely heavily on trusted relationships for support.

10. Intellectually disabled people would like more easyread and accessible information to help them access legal services.

11. Appropriate and effective safeguards are required to protect intellectually disabled people from financial abuse.

RECOMMENDATIONS FOR REFORM:

5. Clear, non-discriminatory, appropriate and effective legal safeguards against abuse are needed to support vulnerable testators.

CHAPTER 6. OPTIONS FOR REFORM

Having discussed the principles which should shape law reform in the area of supported will-making, we now discuss three possible approaches to reform in more detail, highlighting the potential benefits and limitations of each. Before we do, however, it is important to draw together our reasons for suggesting that reform in this area is better than the status quo.

Our research found a gap in access to legal services to make a valid will for intellectually disabled people who have modest means and who need support to make their own testamentary choices. For some, like Penny and Gareth (whose stories we told in Chapter 4), who have personal assistants, advocates, and/or family members who are able to support them to make a will, a will can be made with a combination of independent support, family support and legal advice. Others might have much more limited informal support networks available to them.

The current approach relies on the *Banks v Goodfellow* test for testamentary capacity, in conjunction with the so-called "golden rule". This operates in tandem with, and in some cases in tension with, the requirements of the MCA. Whilst there are undoubtedly pockets of good practice in supporting intellectually disabled people to make wills, all post-legislative scrutiny of the MCA has highlighted poor implementation, and uneven access to support. Leaving aside the important issues of language identified by the Law Commission (2017a), the current legal framework leads to significant variation in both access to legal services, and safeguards against financial abuse depending on the relative access to support that a disabled person has. In our Everyday Decisions research (Harding & Taşcıoğlu, 2017, 2018), we found that supported decision-making, as it is currently understood by care and support professionals, tends to focus on everyday choices, rather than on wider life choices and legal, financial, and medical decisions. Given international pressures to move away from objective, best interests decision-making and other forms of substitute decision-making like guardianship, reform is needed to better embed supported decision-making in our approach to legal capacity. Fundamentally, we are of the view that legal change will be needed to facilitate and embed supported decision-making for more complex decisions more firmly into practice.

6.1 CHANGING PRACTICE

The most straightforward approach to reform in this area would be to rely on the supported decision-making principle in the Mental Capacity Act 2005 (MCA),[101] and revise the MCA Code of Practice to give more detail on both supporting decision-making, and to provide specific advice about helping intellectually disabled people to make a will. Any revision to the Code of Practice would also need to resolve the current lack of clarity over whether the

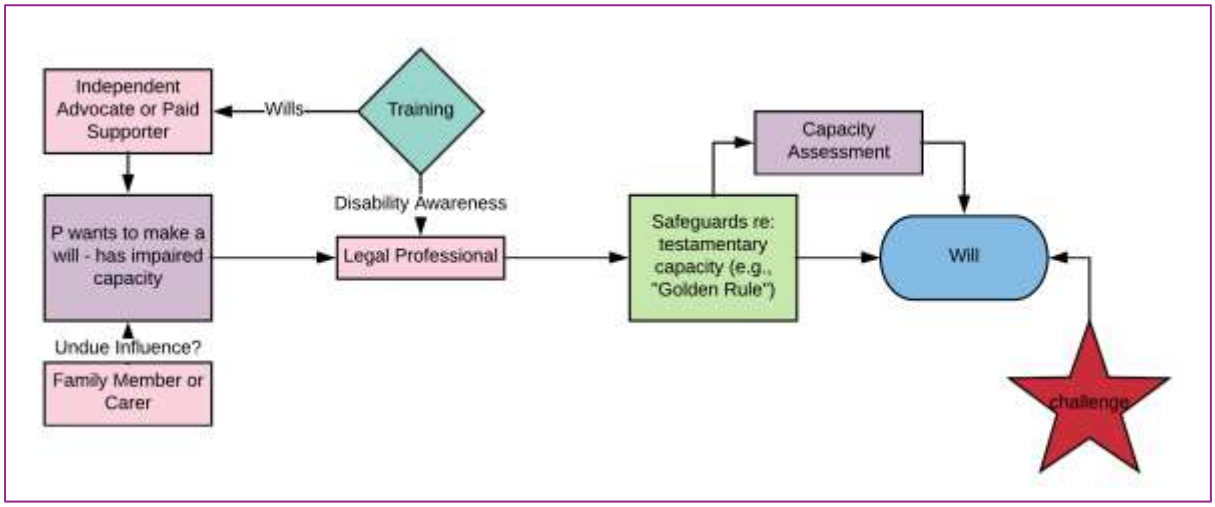
[101] Section 1(3).

MCA principles apply to common law tests for capacity. It would also be necessary to clarify how these principles relate to the 'golden rule' in testamentary capacity, and record-keeping relating to support given and safeguards provided.

6.1.1 TRAINING AND ACCESSIBILITY OF LEGAL SERVICES

Code of Practice revision may be necessary in any case if Law Commission proposals to align testamentary capacity with the MCA test are taken forward. If this revision to the Code of Practice were accompanied by training for solicitors, independent advocates, care and support staff and informal carers/family members, then it may go some way towards filling the gap we have identified. Revision to the Code of Practice could also include discussion of rights to accessible information under the Equality Act 2010 in the context of legal services. If backed up with statutory amendment and regulatory powers, this could also include the creation of duties akin to the NHS accessible information standard within legal practice, which could greatly improve access to justice for intellectually disabled people.

FIGURE 6.1 CURRENT APPROACH + TRAINING



There are, however, several limitations to the current regulatory settlement. First, limited experience and evidence have been developed in supporting complex decisions like those required for will-making. Instead of being understood as a framework that requires people with impaired capacity to be supported, the MCA has been implemented in practice as a means for authorising best interests decision-making by professionals (House of Lords, 2014). Our research (Harding & Taşcıoğlu, 2017, 2018) has shown that the MCA approach works well for straightforward everyday choices, because these kinds of decisions are both easy to make and easy to support through alternative communication mechanisms. Support for more complex decisions requires a high degree of skill, and specialist knowledge and training. This suggests that merely relying on guidance in the revised Code of Practice would fall short of the mark. Furthermore, given the relative lack of supported will-making in current practice, it may be difficult to develop sufficient examples of good practice in this area to underpin a substantive revision of the Code of Practice.

A second difficulty in relying on revisions to the Code of Practice is that implementation through this mechanism lacks the urgency of legislative reform. Whilst it is the case that anyone engaged in supporting a person with a capacity impairment is required to have regard to the Code of Practice, it is difficult to ensure that this translates into real-world support without additional statutory training requirements and associated resource increases. The care and support sector has been under significant financial pressure in recent years, and ensuring quality care services are available to all who need them will continue to be the focus of service delivery until a fundamentally new approach to funding and regulating adult social care is implemented (Harding, 2017a, 2017b).

Further, without significant resources for both training and service delivery, the implementation problems associated with the MCA that were identified by the House of Lords (2014) will remain. Supported decision-making, as mandated by the UN CRPD Article 12, requires a significant shift in the mind-set of professionals and practitioners away from the substitute decision-making 'best interests' approach. The UN CRPD has been described as requiring a 'paradigm shift' in how we understand disability and decision-making in law (Bach & Kerzner, 2010; Booth Glen, 2012; Dhanda, 2006-2007, 2017; Quinn, 2010). Implementing this new world in disability rights, where people with all kinds of disabilities are respected as full and equal citizens, appears to require a significant level of investment in time, training and resources, which should be backed up with legislative change.

We consider that changes to the Code of Practice to facilitate supported will-making are a *minimum* requirement if testamentary capacity is to be brought into the MCA. The slight differences between the MCA capacity test and the *Banks v Goodfellow* test (that the former requires understanding of the 'reasonably foreseeable' consequences of a testamentary disposition, which the latter does not)[102] mean that additional guidance and support for intellectually disabled people making a will is likely to be required. Clarification of the extent of the reasonably foreseeable consequences of a testamentary disposition will also be required to avoid increasing the threshold of capacity for the purposes of making a will. A regulatory power that also provides for accessible information in legal services would be a highly desirable additional change that would help ensure access to legal services, not only in relation to will-making, but also in other areas of mental capacity law, private client, family law and criminal justice practice.

6.1.2 A SIMPLE WILL TEMPLATE

We also considered the potential for a supported will scheme founded on an example or template will that could be completed using easyread support materials. It would, for example, be possible to create a highly simplified will template, backed up by easyread accessible information about how to use it, that has sufficient flexibility to allow people with

[102] *Re Walker* [2014] EWHC 71 (Ch)

impaired capacity and appropriate support to make a very simple valid will. Whilst taking this approach would potentially go against the grain of previous recommendations, such as the recommendation of the Legal Services Board in 2013 that will-writing should be a reserved legal activity, it might open up will-making to a greater number of people than any of the other options set out in this section.

A standard template would not, we consider, be able to deal with more complex family situations, estates where some or all of a person's assets are held overseas, or estates where the testator sought to create trusts. It might, however, enable disabled people with limited resources to express their testamentary choices in a straightforward and inexpensive way.

As a consequnce of the ease of use of a highly simplified will template, the risk of financial abuse might increase. There might also be a greater risk of challenge to this type of will give the potential for those using it to have capacity impairments that impact their testamentary capacity. Many intellectually disabled people would also require support to make a will, even if the information was produced in an accessible form and communicated in a simple and straightforward manner.

It follows that greater safeguards from abuse by supporters would be necessary if this approach were taken. The protection afforded by the proposed statutory framework of testamentary undue influence may be insufficient to protect all testators from abuse in this case. In this limited set of circumstances, independent assessment or certification of testamentary capacity might provide an additional, and beneficial, safeguard. Introducing certification to support the use of a highly simplified will template (which could be used by anyone, not only disabled people) could ensure that independent scrutiny was available, which could help protect testators from harm.

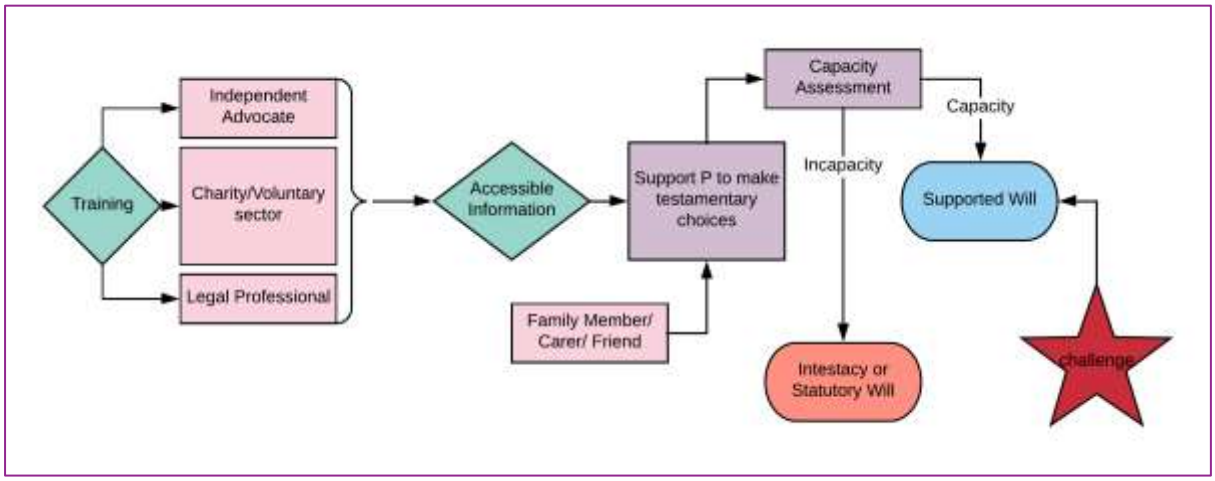
The approach taken to certification for LPAs may not be appropriate for certification of easyread wills, however, as informal certification would be unlikely to sufficiently protect vulnerable testators from individuals colluding to harm their financial interests. Certification in this case might therefore best be provided by legal professionals, who could also check that the will template has been used appropriately, and that the resulting will would be legally valid.

As discussed in part 5.3 above, our research suggests that there is a need for accessible information about legal services, including wills. There are significant potential benefits associated with the development and use of accessible information to support testamentary decision-making, including making wills easier for more people to make. Yet we are concerned that the use of a simplified will template might also expose intellectually disabled testators to higher risks of abuse. As a result, despite the potential for increasing access to will-making we think that an accessible wills template would be best used as a supplement to formal legal advice in making a will, rather than as an alternative support framework.

6.2 A BESPOKE SUPPORT SCHEME

A second possible approach to supported will-making would be to construct a specific framework for support with will-making. Such an approach, which we consider would need to have statutory backing, could set out a series of rights to support, and principles for providing support in the context of making a will. A formal supported will-making scheme could set out rights to support from an independent advocate, could require legal practitioners offering will-writing services to provide support, or could rest upon current charitable will-making schemes. Figure 6.2 sets out how a bespoke support scheme might work.

FIGURE 6.2: A BESPOKE SUPPORT SCHEME



6.2.1 ADVOCACY SUPPORT

If support for will-making were to be delivered by one of the existing categories of statutory advocacy services, [103] training would be required to up-skill the advocacy workforce in supporting will-making. As was evident in our discussion in part 4.1 of this report, the social care workforce currently has limited awareness of the law and practice of making a will. Thinking back to Penny's story, an advocate that she had developed a relationship with over a long period was helpful to her in making the decisions that underpinned her will, rather than with the legal dimensions of actually making the will, where she was supported by a family member and a legal professional.

As supporting will-making is not a current function of any of the statutory advocacy services, new training for advocates in this area would be required. This training would also require ongoing professional development to reflect any changes in the judicial interpretation of the relevant law. Furthermore, because of the particular nature of wills, the relatively short-

[103] There are three main forms of statutory advocacy currently available: Independent Mental Capacity Advocates (IMCA), Independent Mental Health Advocates (IMHA) and Care Act Advocates.

term provision of independent advocacy services may not be the most appropriate approach, as it takes time to form relationships of trust, and to get to know the detail of a person's family and relationship background in detail.

6.2.2 LEGAL SUPPORT

An alternative approach would be for legal professionals to provide support at the time a person is making a will. This option has the benefits of ensuring that the supporter in a supported will-making context has the relevant legal knowledge and understanding. There are, however, two key limitations here: training and costs.

As we discussed above, supporting decision-making by intellectually disabled people requires a particular set of communication skills that currently do not appear in legal training. As the new Solicitors Qualifying Examination replaces the current approach to training, it is also unlikely that there would be scope for this kind of training to be included as standard for all solicitors. For legal professionals to be able to support clients that they have not developed a relationship with over long periods is therefore likely to take significant investment of time both in up-skilling the legal services workforce to communicate well with disabled people, and in the context of getting to know each client's communication needs.

Investments of time in legal services would then consequently translate into higher costs of providing the relevant service. These costs, in the context of privately-provided legal services like wills, would then be passed on to those making a will, driving up the costs for disabled clients as compared to the rest of the population. Pockets of good practice in supporting will-making by intellectually disabled people were described in the Law Commission's consultation paper (Law Commission, 2017a), and these were mainly derived from legal practice. Yet this does not appear to be a sustainable footing on which to rest support for all intellectually disabled people to gain the support they would need to make a will, as it does not address the gap we have identified for those of modest means.

6.2.3 CHARITY/VOLUNTARY SECTOR SUPPORT

A third alternative approach to creating a bespoke supported will-making scheme would be to encourage charities to extend their current will-making programmes to include supported will-making for intellectually disabled people. This would have the benefit of being likely to be available to disabled people without additional costs either to the public (through statutory advocacy services) or to the person themselves (as would be the case through privately-funded legal services). There would undoubtedly be costs for the charities. A significant drawback to this approach would be that there would need to be some avenue for benefit to the charities, which could create conflicts of interest in respect of disabled testators. Given that people with impaired capacity might be at a higher risk of financial abuse, coercion or undue influence, there is a danger that a person being supported to

make their will by a charity may feel compelled (perhaps against their will) to leave a bequest to that charity.

Another challenge that would need to be addressed if the focus of reform was on facilitating charitable or voluntary sector support concerns the issue of trust. Relationships of trust appear to work best if developed over a period of time. It can be difficult, as noted in both of the case studies we set out in Chapter 4, for intellectually disabled people to tell their life stories to strangers. For some, like Penny, this is rooted in concerns that it would take a long time to go through the whole story; for others, like Gareth, it might require them to relive experiences of abuse, or talk about poor relationships with family members, which can be both difficult and upsetting. Unwillingness to open up about these details might lead to problems with the resulting will insufficiently providing for dependents, or being left open to challenge where charitable donation is prioritised above family members.

6.2.4 LIMITATIONS OF A BESPOKE SCHEME

Irrespective of whether support under a bespoke scheme came from advocacy, the charitable sector or a legal professional, we consider that capacity assessment, including record-keeping of that assessment would be a minimum required safeguard. It would be difficult to predict how family members, carers or friends might influence the decisions made by the testator, as they would not officially be part of the support process. Further, we consider that if any of these bespoke options were taken forward, particular safeguards would be required to protect supported wills from challenge and to protect testators from undue influence and other bad-faith practices like fraud.

There is a danger that wills made through a bespoke supported will-making scheme might, like wills made using a simplified will template, be subject to a higher risk of challenge, due to perceptions of the incapacity of the disabled person. As we have discussed above and elsewhere (Harding & Taşcıoğlu, 2017), the current MCA is often understood in practice as a mechanism for making lawful substitute decisions, rather than as a requirement to support the person to make their own decisions about their lives. As a consequence, a disappointed potential beneficiary might be more likely to challenge a will made through a support scheme than a will made without such support.

The courts appear, at present, to have a tendency to err on the side of protecting testamentary freedom under the current approach to testamentary capacity.[104] It is likely that this preference for upholding wills made by testators whose capacity is questioned by disappointed beneficiaries is connected to the lack of alternative means of protecting testamentary capacity for most testators (given the high costs, and therefore limited availability, of statutory wills). We consider that any new statutory scheme would have to

[104] *Burns* v *Burns* [2016] EWCA Civ 37.

replicate this kind of preference for testamentary autonomy in order to protect it. The most straightforward safeguard here would to place the burden of proof the person challenging the will on the basis of lack of capacity, rather than on the propounder of the will.

6.2.5 SAFEGUARDS

A bespoke supported will-making system would require the development of a system of specific safeguards which go beyond those applicable to all wills. This would be needed to ensure that supported testators are adequately protected against financial abuse, undue influence and fraud. In addition to the proposed new statutory approach to testamentary undue influence, specific safeguards that would need to be considered include:

- limitations on who can act as a 'supporter' in the context of wills, perhaps to ensure that support was independent, though bearing in mind the preference expressed by disabled participants in this research to be supported by someone they know and trust;
- limiting the ability of a supporter (and closely connected parties, like their spouse, partner and close family members) to benefit under the will of the person they are supporting; and
- creating a fiduciary relationship between the supporter and the person they support (similar to that imposed upon an attorney or deputy under the MCA), perhaps with a good faith exception.

Safeguards like these would be necessary under any bespoke supported will-making scheme approaches to making a supported will. We discussed these kinds of safeguards in more depth in part 5.4. To avoid creating discriminatory additional frameworks for disabled people, that might paradoxically make it more difficult for disabled testators to make a will, there would be an argument that any safeguards created to protect disabled people should apply to all testators. Constraints and restrictions placed on support would then potentially cause problems for anyone making a will who requires the assistance of friends and family members to access legal services for whatever reason.

Careful interrogation would also be required as to what 'counts' as support in this context. For example, clarity would be needed about whether practical support (e.g., help finding a solicitor, help with travel to the appointment) would be sufficient to disqualify a family member or friend from benefiting under the will as a supporter, or whether 'support' for the purposes of the bespoke scheme would only include decision-making support, rather than practical support. If the latter, then it would be necessary to evaluate where and when decision-making support takes place. If only support within the context of an appointment with a legal professional would count, then this might not sufficiently protect testators from more subtle forms of coercion and undue influence. If any kind of decision-making support would be included, then this might raise a wide range of difficult problems that would need to be resolved through expensive litigation challenging supported wills. Finally, training, of

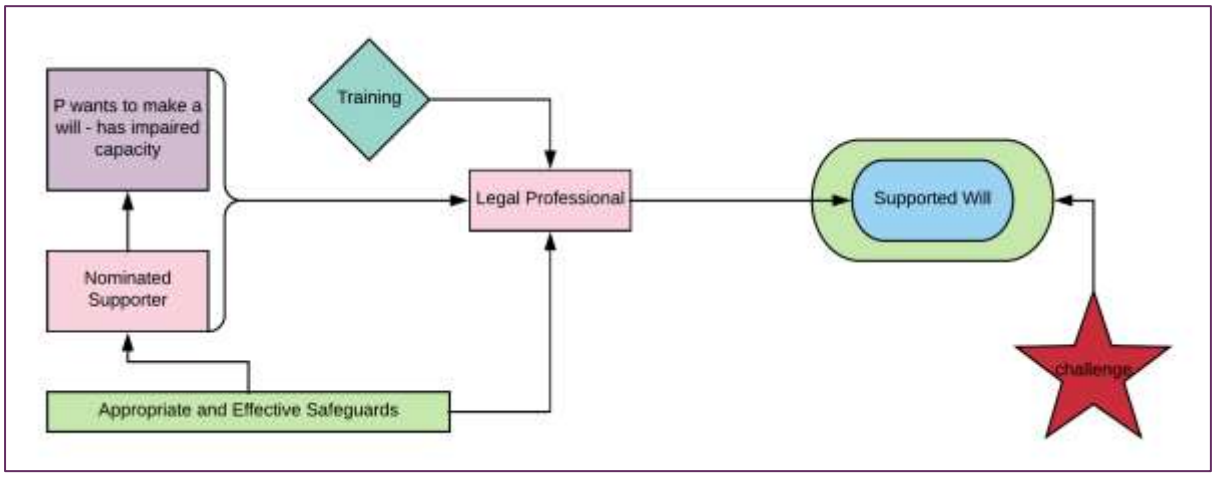
the kind discussed in more depth in part 6.1, above, would also be required to ensure that persons acting as supporters are well trainined in accessibility and communication.

In conclusion, therefore, it would be possible to introduce a bespoke supported will-making scheme, with specific safeguards, and where support is provided by an external third party. If such a scheme were introduced, we think that supporters would need to be independent, and excluded from being named as a beneficiary in the will. This might cause problems where the support is provided by a charity. Such a scheme would benefit from being supported by the introduction of an accessible information standard for legal services, and specific training would need to be provided for supporters. The costs of support would likely be bourne by disabled testators, which could significantly increase the costs of making a will, and therefore paradoxically acting as a disincentive to making a will. On balance, therefore, we think that the possible benefits of a bespoke will-making scheme may be outweighed by the additional costs and risks associated with it. If a bespoke scheme were introduced, careful economic modelling as to the additional costs that would fall on vulnerable testators would be required.

6.3 A FORMAL NOMINATED SUPPORTER SCHEME

The third option, which would be a departure from the current approach under the MCA, would be to create a formal nominated supporter scheme, along similar lines to that proposed by the Law Commission in their Mental Capacity and Deprivation of Liberty Report (Law Commission, 2017b). This is the approach that we prefer, notwithstanding the potential benefits of also implementing the training and accessible information recommendations we have set out in part 6.1 above. Figure 6.3 shows how a nominated supporter scheme might work in respect of supported wills.

FIGURE 6.3: A NOMINATED SUPPORTER SCHEME



As discussed in Chapter 2, a number of formal support models are currently in use or in the process of implementation around the world. Under these schemes, a disabled person can quite easily appoint a family member or friend to be a supporter. This supporter can provide

help to make decisions, and to act in a range of areas. Formal support can offer genuine alternatives to best interests focused substitute decision-making schemes.

A nominated supporter scheme can, as is the case in Ireland, be introduced in a manner that retains a functional assessment of capacity, and the potential to make essentially substitute decisions that prioritise the wishes and preferences of the person as a last resort. It can also operate alongside other frameworks (like the MCA) as an alternative to them. This aligns with the model that is used in both British Columbia, Canada and Victoria, Australia, where the supporter frameworks sit alongside power of attorney and guardianship provisions.

Experience from other jurisdictions suggests that there are substantial potential benefits associated with a nominated supporter scheme, in addition to offering greater compliance with obligations under the UN CRPD. A pilot study in Bulgaria (Bulgarian Centre for Not-for-Profit Law, 2014), for example, concluded that supported decision-making improves the quality of life of intellectually disabled people and has positive effects on self-determination, personal development, inclusion in the community and independent living. They also concluded that there were significant economic benefits associated with supported decision-making (Bulgarian Centre for Not-for-Profit Law, 2014). Evaluation of a supported decision-making pilot scheme in South Australia noted similar benefits to supported persons, and additional benefits to supporters (Wallace, 2012). Benefits to supporters included changes to the ways they thought about decision-making with the person they supported, and "positive improvements in the nature and quality of their interpersonal relationships" (Wallace, 2012, p. 5).

As with other nominated supporter schemes, we think that nominated supporters, particularly those who support financial decisions, should be subject to supervision by a public body. Supervision offers the most effective way to provide appropriate and effective safeguards to prevent abuse, as required by Article 12(4) CRPD.[105] The system of court of protection visitors,[106] set up to supervise Court of Protection Deputies and attorneys under registered enduring and lasting powers of attorney could, we consider, be extended to include supervision of nominated supporters. Additional supervision would generate additional costs, but we consider that the potential savings that arise from supported decision-making, in combination with modest registration, reporting and supervision fees are likely to off-set these costs. Importantly, the costs and benefits of a nominated

[105] UN CRPD Article 12(4) "States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests."

[106] MCA 2005, s. 61

supporter scheme would be spread widely across a range of public and private services, rather than falling directly onto the public sector, and they would not significantly increase the costs of making a will for vulnerable testators.

6.3.1 TESTAMENTARY SAFEGUARDS IN A NOMINATED SUPPORTER SCHEME

As Figure 6.3 demonstrates, the key difference in a nominated supporter scheme is that instead of safeguards being focused on the functional capacity of the disabled person, the safeguards are directed at those third parties in the process who have the potential or opportunity to perpetrate financial abuse.

In respect of nominated supporters, this would primarily be through supervision, supplemented by the same safeguards that apply to everyone making a will; in respect of legal professionals, safeguards would be, as at present, delivered through regulatory bodies and professional standards. We do not provide more information about how supervision of legal professionals would work here, as this is outside the scope of our report. We also do not provide full details of the economic costs a nominated supporter scheme, as supporting people to make wills would only be a small part of a formal nominated supporter scheme.

In the proposed new statutory doctrine of testamentary undue influence, a recognised nominated supporter could be added to the list of people in a relationship of trust. If they were, a gift to a nominated supporter that requires explanation in the will would then raise the presumption of undue influence. Importantly, this safeguard does not place additional burdens (either financial or practical) on the disabled person making a will. Instead, the safeguards are targeted at the potential source of the abuse. Making clear that a formally recognised, nominated supporter owes a fiduciary duty to the person they support would also help to safeguard vulnerable testators from abuse by the person supporting them.

We consider that it would be more appropriate to safeguard vulnerable testators through the operation of testamentary undue influence than to introduce specific safeguards, like preventing a supporter from being able to inherit under the will. This is because we consider that a nominated supporter is likely to be a family member or friend, and that it might place undue restrictions on the will and preferences of a disabled person to exclude them from being able to leave a gift to a person who has been important in their lives.

Overall, we consider that a formal nominated supporter scheme is likely to offer the greatest potential benefits for intellectually disabled people, and would include support with making a will. If a formal supported decision-making scheme were introduced, it could reduce the need for complex bespoke assistance with will-making from statutory advocacy services or legal professionals. Even if a formal nominated supporter scheme were introduced, we still consider that training for advocates about wills, and for solicitors in communicating with disabled people would provide positive benefits in access to legal services for disabled pople. The introduction of an accessible information standard for legal

service providers would similarly provide positive benefits to all disabled people in all areas of legal services.

6.4 CONCLUSIONS

In this chapter, we discussed the reform options for supported will-making. Overall, we consider that reform is necessary to fill an identified gap in access to justice and access to legal services for disabled people, particularly those with intellectual and sensory impairments. Reform is also timely, building on contemporaneous reforms to the Mental Capacity Act 2005 and the 2018 review of the Mental Health Act 1983, both of which seek to bring English law closer into alignment with the UN CRPD, even if these reforms and proposals stop short of full compliance with the CommitteeRPD's interpretation of Article 12 in places.

Some benefits could be gained by simply revising the MCA Code Practice. Given that a revision to the Code of Practice is expected in the near future, it would be straightforward to include more substantive discussion of how to support decision-making in general and supporting will-making in particular. We consider, however, that some legal reform is necessary to clarify how the MCA principles interact with surviving common law tests, including the test for testamentary capacity under *Banks* v *Goodfellow*. Any revision to the Code of Practice should also be supported by training requirements, both for frontline health and social care professionals, and for legal professionals.

We explored the potential for a 'bespoke' supported will-making scheme. Whilst there are positive benefits to be gained from creating a bespoke scheme, on balance we consider that the level of regulatory complexity that would be required, the need for training, and the limitations of a bespoke scheme mean that this is not the optimum approach to supporting disabled people to make wills. Instead, we consider that the wider context of support for decision-making, alongside international developments towards more formal supported decision-making schemes suggest that the best approach to supporting intellectually disabled people to make their will, keep it under regular review, and safeguard them against financial abuse, would be to introduce a formal nominated supporter scheme.

The policy proposals set out in this chapter are summarised in Table 6.1. We consider that a statutory doctrine of undue influence, that recognises the relationship of influence between a supporter and supportee is essential. We also consider revision to the MCA Code of Practice, and training of legal professionals, advocates and other supporters to be essential. We consider the introduction of a nominated supporter scheme and an accessible information standard for legal services to be desirable policy reforms, and that both a bespoke supported will-making scheme and a simplified will template to be possible options for reform.

TABLE 6.1: SUMMARY OF REFORM OPTIONS

Policy Proposal	Status	Reasons
A statutory doctrine of undue influence	Essential	All of our policy proposals for supported will-making rest on the assumption that a statutory doctrine of undue influence will be introduced.
MCA Code of Practice Revision	Essential	Some parts of the current Code of Practice are unclear around the relationship between common law and statutory tests of capacity.
Training for Legal Professionals	Essential	Our empirical research suggests that disabled people do not find it easy to access legal services. Training for legal professionals in how to communicate better with disabled clients would help address this issue.
Training for advocates, frontline care staff and other supporters	Essential	Training for advocates and other supporters on the legal issues relating to making a will, and the consequences of not making a will would help them to support disabled people to access legal services and to make wills.
An Accessible Information Standard for Legal Services	Desirable	Like the accessible information standard in health and social care, this would help ensure that legal services are accessible to all. Specific legal change may not be required, as accessible information is already covered by the Equality Act 2010. This recommendation could, therefore, be actioned by legal services regulators and professional bodies.
Formal Nominated Supporter Scheme	Desirable	The optimum way of ensuring that disabled people have access to support for their legal capacity, with appropriate safeguards to protect them from undue influence and conflicts of interest.
A Simple Will Template	Possible	Easyread support materials about making a will and a simple will temaplate would be helpful for many people. Stringent safeguards would be needed.
A Supported Will-Making Scheme	Possible	A bespoke scheme would increase support for will making but might be costly. Would need to be backed up by stringent safeguards.

RECOMMENDATIONS FOR REFORM:

6. The introduction of an Accessible Information Standard would be extremely helpful in increasing the accessibility of legal services.

7 . The creation of a formal nominated supporter scheme, with supervision from a public body is likely to be the best way to balance choice, support and safeguards.

CHAPTER 7. OVERALL CONCLUSIONS

In this report, we have explored the issue of supported will-making in the context of national, international and comparative legal frameworks, care and support professional practice and intellectually disabled people's views and experience. We have explored why and how disabled people can and should be supported to make their will, the issues raised and the concepts that should guide reform in this area.

Throughout the report, we have explored the international development of supported decision-making practice in response to the paradigm shift sought by the UN CRPD, and the Committee on the Rights of People with Disabilities' interpretation of the rights set out in the Convention. Our aim in doing so has been to ensure that our key findings and our recommendations are in line with contemporary understandings of disabled people's rights, whilst being aware of and attentive to the current legal and political backdrop to capacity law in England and Wales.

In this report, we have identified a gap in access to will-making by disabled people with cognitive and sensory impairments. In the interests of justice and supporting disabled people's right to equal treatment under the law, it is vital that this gap is filled. At a minimum, this will require substantive updating of the MCA 2005 Code of Practice, some clarification of the relationship between common law capacity tests and the MCA principles, and training for both frontline care staff and legal professionals. Training for frontline care staff on the importance of will-making and legal professionals on communicating with disabled clients should not require legal change, but will require policy engagement from the relevant regulatory bodies.

We consider it vitally important that clear, appropriate and effective safeguards against abuse in the context of wills made by vulnerable testators should be included as part of the review of the law of wills. Recognising that vulnerability to financial abuse can arise as a result of circumstances and relationships, not as a direct consequence of particular impairments, we consider that any safeguards that are introduced need to protect all vulnerable testators, not be directed solely at intellectually disabled people. Ensuring that safeguards against abuse, particularly through changes to the doctrine of testamentary undue influence apply to all testators will mean that intellectually disabled people are not subject to increased (and therefore discriminatory) barriers to making a will.

In response to our participants' stories about the challenges they experience in accessing legal advice and information, and in addition to our recommendation for training for legal professionals in communicating with disabled clients, we have recommended the introduction of an Accessible Information Standard (AIS) for legal services. We consider that this would complement the existing AIS for NHS and adult social care services. It would ensure that intellectually disabled people have the best possible chance for access to justice and access to legal services. Embedding accessibility into legal service provision would also

assist legal service providers in meeting their duties relating to reasonable adjustments in service provision under the Equality Act 2010.

We have set out what we consider would be required for a bespoke supported will-making scheme. This would require training for anyone involved in supporting disabled people to make a will (e.g., advocates, legal professionals, charities).

Finally, on balance, and considering all of the relevant issues, we have come to the conclusion that the best way to fill the gap in access to will-making would be through a nominated supporter scheme. We recognise that this is a departure from the current approach to supporting decision-making under the Mental Capacity Act 2005, but the balance of international evidence suggests that nominated supporter schemes are cost effective and produce wide-ranging benefits to intellectually disabled people.

In conclusion, our key findings and recommendations for reform are as follows:

7.1 KEY FINDINGS

1. Internationally, supported decision-making is becoming increasingly common.
2. Nominated supporter schemes are being used in a range of jurisdictions around the world to provide better support to intellectually disabled people.
3. There is a gap between the intestacy rules and (expensive) statutory wills in access to appropriate support for making a will in England and Wales.
4. The relationship between the common law test for testamentary capacity and the Mental Capacity Act 2005 principles is legally unclear.
5. Disability can make a difference to usual patterns of inheritance.
6. Frontline care and support professionals have limited awareness of how to make a will and do not feel confident supporting service users in this area.
7. Intellectually disabled people would like to be supported to make a will that reflects their wishes and preferences.
8. Intellectually disabled people said that solicitors were not always good at communicating information about wills in accessible ways.
9. Intellectually disabled people rely heavily on trusted relationships for support.
10. Intellectually disabled people would like more easyread and accessible information to help them access legal services.
11. Appropriate and effective safeguards are required to protect intellectually disabled people from financial abuse.

7.2 RECOMMENDATIONS FOR REFORM

1. Substantive updating of the Mental Capacity Act 2005 Code of Practice is needed to include more examples of how to support decision-making in general, and supporting will-making in particular.
2. Clarification of how the Mental Capacity Act 2005 principles (especially principles 1, 2 and 3), interact with conflicting approaches in common law capacity tests is required.
3. Training for frontline care staff and statutory advocates on the importance and practicalities of will-making is required to better support testamentary choices.
4. Training for legal professionals who provide will-making services (including solicitors, legal executives and will-writers) on effective communication with people with intellectual and sensory disabilities is needed to ensure legal services are accessible.
5. Clear, non-discriminatory, appropriate and effective legal safeguards against abuse are needed to protect vulnerable testators.
6. The introduction of an Accessible Information Standard for Legal Services would be extremely helpful in increasing the accessibility of legal services.
7. The creation of a formal nominated supporter scheme, with supervision from a public body, is likely to be the best way to balance choice, support and safeguards.

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