Family Law
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their wishes and feelings and to understand the nature of the judge's task'. However, judges have to be wary of the risks of going beyond simply listening to the child's views and explaining their role. There are problems for the forensic process if the meeting is used to gather further evidence by testing or 'probing' what the child says, or affording the child an opportunity to 'argue' their case (See *Re KP (A Child)* [2014] EWCA Civ 554, [2014] 2 FLR 660, for an example of when this kind of meeting went wrong).

The court and the adult parties have many issues to weigh in the balance when deciding the extent to which a child should be directly involved in the court process. It is not limited to the age and level of understanding of the child but encompasses also the nature and strength of the child's wishes, their emotional and psychological state, the effect of influence from others, the evidence to be given, as well as the impact of practical and logistical difficulties of court room layouts or availability of a video link. These various issues are difficult enough for adults to hold in mind and weigh against each other. My teenage clients have been found to have the capacity to instruct their own solicitors but their engagement in the proceedings is often then very limited, by their own distress and unwillingness to provide anything other than very basic instructions. It is not unusual to find myself 'representing' a teenager in court I have never met. I doubt in those circumstances the fairness of the proceedings is in any way enhanced and I query what benefit flows to the child from such limited engagement.

I do wonder whether the pendulum is now swinging too far away from paternalism and to presuming children seek an autonomy they cannot exercise and do not want. The impression many child litigants give is that they crave the safety and security of knowing an adult cares enough to make decision about important issues. This appears to be so in Sam's case. Although the judge made a decision he ostensibly did not want, Sam bore it with 'equanimity'. It would be interesting to speak to Sam in a few years and see what comments he has from his adult perspective.

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Update

E-wills and oral wills: a new age of testacy?

The wholesale review of the law relating to the making of wills carried out by the Law Commission and published in its consultation paper No 231 on 13 July contains many sensible suggestions and some which at first glance appear startling. One of the most ground-breaking proposals is that the court should have a statutory power to dispense with the requirement for a will to satisfy the usual prescribed formalities, and for a will to be valid if there is sufficient evidence of the testator's intention. This article will explore from the point of view of a litigator what implications the introduction of such a power might have for testators.

It is clear that the Law Commission is motivated to make it easier for people to make wills as, despite the availability of inexpensive methods of preparing a will (such as stationery packs and software available online) about 40% of the adult population of England and Wales are intestate. While the Law Commission recognises the various functions of the existing statutory formality requirements, it wishes to introduce a 'safety net' for testators who have tried to make a will but failed to do so in the proper form. Versions of the proposed 'dispensing power' exist in a number of other jurisdictions including all Australian states, New Zealand, Canada, South Africa and a number of US states. The Law Commission favours an intention-based dispensing power, so that the court would be able to consider whether, on the balance of probabilities, a testator had demonstrated an intention to make a will containing certain provisions. Views are being canvassed as to whether the necessary evidence might take the form of electronic documents, audio and video recordings and/or purely oral statements. The

preliminary view of the Law Commission is that the former two forms of evidence should suffice, but that the dispensing power should not be available where the only evidence of a testator's intention is an unrecorded oral statement.

In its consultation paper, the Law Commission also seeks views as to whether the Lord Chancellor should have power to make provision by statutory instrument for the validity of wills executed electronically and then printed and/or entirely electronic wills. It is emphasised that such wills might at present be valid (see the debate at paras 6.15ff of the paper), and in any event might be capable of being found to be valid in the future using the proposed dispensing power.

The proposals have inevitably caused concern that the advantage of enabling more people to make valid wills is outweighed by the risk of exploitation of vulnerable testators. It may be thought to be easier for an unscrupulous person to procure typed words of the testator's purported intention to make a particular will, or even to procure a video or audio recording of the testator stating such an intention, than for such a person to procure a will which must exist physically, be signed by the testator and signed by two witnesses who do not benefit from that will.

At the heart of such concerns is the basic fact that the testator would not be present at the trial to authenticate such documents or recordings, and the court would have to do the best it can in deciding whether weight can be attached to them. This difficulty has existed throughout the history of contentious probate. Those propounding wills often provide witness evidence of oral statements made by the testator as to his alleged testamentary intention, although judges have (it is suggested, rightly) been sceptical as to the weight to be attached to such self-serving evidence. Even recordings of a testator may well be 'staged'; the vulnerability of the testator may make him suggestible and liable to give unreliable answers to leading questions and/or to give pre-rehearsed answers to open questions. The viewer of such recordings cannot know what was going on behind the camera. For the purposes of an audio recording designed to prove a testamentary intention, the testator may be doing no more than reading the words of a script written by a beneficiary. A recording may be edited. Even a recording made by a solicitor or other independent professional adviser may not be reliable evidence of the testator's intention made after free and informed thought: for example, the testator may still have been rehearsed, and testators who have been coerced by a beneficiary may still make a will through a solicitor who is unable to identify such coercion. Written documents apparently produced by a testator which do not satisfy s 9 of the Wills Act 1837 but might nonetheless be rescued by the proposed 'safety net' might consist of nothing more than a document typed by a beneficiary and signed by the testator, or written by the testator at the beneficiary's dictation.

It is suggested that the dangers inherent in the introduction of a dispensing power require, at the very least, that the standard of proof to be applied in exercising such a power should be higher than the balance of probabilities. As stated in the consultation paper (para 5.100), some of the jurisdictions which currently have such a power require that it can only be exercised if there is 'clear and convincing' evidence of testamentary intention, or no reasonable doubt that a testator intended a document to constitute his will. If the civil standard of proof were to apply, it would be left to judges to adopt a properly cynical view of self-serving evidence as to testamentary intention and, where appropriate, to require forensic evidence as to the authenticity of electronic documents and/or recordings said to contain such evidence.

Although a review and reform of the current law relating to the validity of wills should be welcomed by practitioners in this field, it is suggested that the current proposals will create too much opportunity for the exploitation of vulnerable testators. It is to be hoped that having heard responses from practitioners, the Law Commission will reconsider its current proposal as to the

introduction of a dispensing power. See further Brian Sloan, 'Wills, marriage and cohabitation: the Law Commission's consultation questions' at p 1026 below

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The CMS: third generation scheme

Our current child support scheme is a third epoch in a history that stretches back to April 1993, when our administrative system went live:

- From April 1993, CS1, there was a complex formula with poor delivery that would see £3.8bn of arrears build up before;
- In March 2003, it was supplanted for new cases with the simpler formula (with its familiar 15, 20, 25% bands for 1, 2, 3 or more children); but then
- From December 2012 a new 'gross income' system, began its roll-out with its plethora of percentages applied – usually – to the gross income last reported to HMRC. (The CMS was relieved of the responsibility of determining the income of the Non Resident Parent (NRP).

A golden era . . . that has already passed

Between April 1993 and March 2003, the administrative child support system was a misery of non-performance for most. It would see enforcement powers extended time and time again by a Government desperate to create a working system. Eventually, it was recognised that the real problem was simply that the head-count and skills resources of the Agency's staff were insufficient for the scale of investigation required by the task – where one calculation alone might require over 100 pieces of information to be assembled (Select Committee on Work and Pensions 2nd report January 2005, para 8).

From December 2012, the new system ('the Child Maintenance Service') went live, to become – for some – a misery of unfairness. The old failures were a system overburdened by the demands of a complex formula targeting fair outcomes (that in consequence delivered none where the obligors were sufficiently committed to evading responsibilities). The latest iteration seemed to sacrifice the goal of fair outcomes in favour of a system that is cheap and easy to operate. Particular challenges exist where the obligor's finances pass a threshold of complexity that permits significant capacity to pay to be hidden behind headline low taxable income. It seems strange that we must now look back on what lay between these periods 2003 to 2012 as the golden years of child support.

Changes in policy: continued exclusion of the courts

Along this continuum we have changed from a scheme that required parents to authorise the administration to pursue a claim on their behalf to a system that would exclude all save those persistent or insistent enough to battle their way past the 'information service' CM Options and (generally) pay a fee for the privilege. Where on top the current CMS administration is used to manage collection then substantial further fees are charged. It is a system that might have been designed to minimise take up. It is easy for the DWP to present the DIY 'family based arrangement' as a victory for family self-determination (as it does in its report 'Effective family based child maintenance arrangements' (16 May 2017)) but the underlying reality may be that these are lower-level, informal commitments with patchy compliance which short change children their financial provision.

As with all changes there are winners and losers. Those sufficiently well informed or supported to get into the current system, pursuing claims from Non Resident Parents ('NRPs') with neat constant PAYE income, may well find an effective system for fixing and managing child support obligations. Those with financial complexity may find themselves battling to have their circumstances understood. However, numerically it is the applicant parent ('parent with care' or 'PWC') pursuing a