

Comments by Thurrock Local History Society in Response to the Consultation by the Ministry of Justice on the Storage and Retention of Original Will Documents.

Before commenting on the specific questions raised in the consultation, Thurrock Local History Society (TLHS) would like to make general points about the relevance of wills to local history and about this consultation.

Wills are an important source for local, landscape and family history for all time periods since the establishment of the national system in 1858. They can contain information not only about a testator's property holdings but also their address, names of friends and relations and often an indication of the closeness of the testator's relationship with such people. They have a particular importance for the period 1922 - 1938 because of the loss of the 1931 census. Although the 1939 register provides useful information, it lacks details that would be found in a full census. As no census was taken during World War II, wills are also especially important in the period 1939 - 1950. The years from 1922 - 1950 saw dramatic changes in Thurrock because of the second world war, the growth of the cement industry, the decline in agriculture and the increasing commuter population of the area. TLHS therefore welcomes the better access that digitisation will provide. However, the Society has a strong interest in the preservation of the original wills together with any associated case papers and have concerns about the current proposals.

This consultation is by the Ministry of Justice and although the list of those to whom the consultation document has been sent suggests that the Ministry is aware of the potential importance of its proposals to historians, the consultation document fails to begin to identify and address the possible interests of historians, instead confining itself to the interests of the courts and legal professionals save only for the occasional reference to the "emotional" or "sentimental" relationship between a testator's family or society and the relevant documents.

Question 1: Should the current law providing for the inspection of wills be preserved?

TLHS believes that wills and associated documents currently held by the Principal Registry or in any district probate registry should be available for inspection and that this should be a legal right, although this could be secured by a new law transferring to another body, after an appropriate period, the duties to preserve the records and allow inspection.

Question 2: Are there any reforms you would suggest to the current law enabling wills to be inspected?

As we have noted, the consultation is by the Ministry of Justice. This inevitably means that the focus is on the legal significance of will documents rather than the significance of the documents for historical research. We believe that the rationale for inspecting wills (paragraph 18 of the consultation document) should be extended to include inspection of wills for the purposes of historical research.

Question 3: Are there any reasons why the High Court should store original paper will documents on a permanent basis, as opposed to just retaining a digitised copy of that material?

Experience of using digitised records suggests a variety of reasons why physical copies of wills and associated papers should be preserved. These include:

a) The reverse side of a document being digitised is sometimes missed.

- b) Accidentally turning two pages in a document can also result in missed entries.
- c) The digitised image can sometimes be unreadable, for example because of camera movement during digitisation.
- d) With a smaller document on top of a larger document, the two can be digitised together with consequential loss of information on the larger document obscured by the smaller one.

These deficiencies may not come to light until many years after digitisation and if the originals have been destroyed, important information can be lost.

It is also possible that digitised images may become unreadable or inaccessible.

- a) There may be changes in software standards. This happened with some of the material from the Mucking excavation in the 1960s and 1970s which was stored using technology that became obsolete within a few years.
- b) There could be malicious cyber-attacks (as experienced by the British Library in 2023).

In addition, the original documents may contain information that is not recorded in the digitised version – see the answer to question 5.

Question 4: Do you agree that after a certain time original paper documents (from 1858 onwards) may be destroyed (other than for famous individuals)? Are there any alternatives, involving the public or private sector, you can suggest to their being destroyed?

For all these reasons given in answer to question 3, TLHS while welcoming the proposed digitisation, is opposed to the destruction of the original wills. The Society also recommends the digitisation of any associated case papers as well as the retention of the physical case papers. Since the High Court is not primarily concerned with archival preservation of historical documents, the duty to preserve original wills and associated papers could be transferred to another body such as the National Archives. Alternatively, rather than destroying the original wills and case papers, it may be possible to transfer their ownership to a non-governmental body willing to preserve them such as a university or library in this country or overseas. We believe that no will or associated papers should be destroyed until the possibility of transferring ownership to another body has been demonstrated to be impractical.

Question 5: Do you agree that there is equivalence between paper and digital copies of wills so that the ECA 2000 can be used?

TLHS does not agree that there is an equivalence between paper and digital copies. As mentioned in the answer to question 3, the original documents may contain information that is not recorded in the digitised version.

An example of information in the original that would not be recognised during digitisation occurs in the 17th century records relating to Thurrock recorded by the Bishop of London. The originals of these had already deteriorated badly at the time they were microfilmed. Consequently, large parts of the microfilm images are unreadable. However, it is possible that modern techniques may be able to recover the information that has been obscured in the originals – for example by imaging at different wavelengths such as infra-red. A variety of techniques are now available that were not known about when the originals were microfilmed.

It is possible that this could be the case with the probate documents. In addition, the original wills may be of interest for studies where the digitised images cannot be used - examples could be

composition of inks; accessing radioactivity in the paper or consideration of watermarks. It is possible that within a few years techniques will be available to study aspects of the will documents that we cannot currently imagine.

Question 6: Are there any other matters directly related to the retention of digital or paper wills that are not covered by the proposed exercise of the powers in the ECA 2000 that you consider are necessary?

It is not clear that exercising the powers under the ECA 2000 would ensure that the interests of groups outside the legal community (such as historians and genealogists) would be adequately represented in the decision-making process.

Question 7: If the Government pursues preserving permanently only a digital copy of a will document, should it seek to reform the primary legislation by introducing a Bill or do so under the ECA 2000?

TLHS believes that any change in the current law requiring the preservation of original wills and associated papers should be by primary rather than secondary legislation. This is for the reasons given in paragraphs 39 and 40 of the consultation document – that primary legislation allows additional matters to be considered and provides for a greater degree of parliamentary scrutiny.

Question 8: If the Government moves to digital only copies of original will documents, what do you think the retention period for the original paper wills should be? Please give reasons and state what you believe the minimum retention period should be and whether you consider the Government's suggestion of 25 years to be reasonable.

Although TLHS believes wills and associated papers should be retained indefinitely, we suggest if these documents are to be destroyed, the minimum retention period should be sufficient to address identified potential issues.

Recognition that a particular person is famous may take place many years after their death. Alan Turing for example died in 1954 at which time his work at Bletchley Park was classified. Hints that the Enigma code had been broken emerged in the 1970s, but a more complete story became available between 1979 and 1988. However, two of Turing's papers were not declassified until 2012. A more extreme example is Thomas Bayes who died in 1761. The theorem that bears his name was not published in his lifetime and the term Bayesian was apparently not used until the 1950s. It was only with the advent of modern computers and the emergence of "Data Science" in the 1990s (some 230 years after his death) that his importance began to receive the recognition it has today. There are many other cases in the UK and abroad where recognition of the importance of an individual was not appreciated until many years after their death. It therefore appears to us that wills and associated papers need to be retained for a minimum of 50 to 100 years to reduce the risk that the will of a famous person is destroyed.

It is virtually impossible to be sure that there are no digitisation errors. In most cases a digitisation error is likely to be noticed by a family historian. There are a large number of wills and administrations each year. Although genealogy is a popular hobby, only a small percentage of the people making these will have a family member who is interested in family history. It would typically be someone two or more generations beyond the testator who would want to see the will or other papers. It could therefore be hundreds of years before there is a reasonable chance that all digitisation errors have been spotted.

It is even more difficult to estimate the length of time needed for the discovery of new techniques that could be used to derive additional information from an original will. To quote an example in the news recently, in 1752 workmen discovered a large number of papyrus scrolls turned to carbon by the eruption of Mount Vesuvius in AD 79. In 2024, it was announced that small amounts of some of these scrolls had been successfully read using 3D X-ray software – 272 years after the first scrolls were discovered.

From these examples we conclude that the proposed retention period of 25 years is not reasonable and that an appropriate retention period is measured in hundreds of years. For practical purposes this implies an indefinite retention period. As acknowledged in question 4, the retaining body does not have to be the High Court.

Question 9: Do you agree with the principle that wills of famous people should be preserved in the original paper form for historic interest?

We repeat that we believe that all wills and associated papers should be preserved, and we believe that there is no completely satisfactory and transparent method for determining which wills should be preserved “for historic interest”. A person may be highly important in their field without being “famous”. Conversely, some individuals who were “famous” when they died may be regarded as unimportant within a generation or two.

Question 10: Do you have any initial suggestions on the criteria which should be adopted for identifying famous/historic figures whose original paper will document should be preserved permanently?

If only the wills and associated papers of famous and historic figures are to be preserved, we believe the widest possible interpretation of “historic interest” should be employed. People whose wills are retained should include (but not be limited to) people associated with art, literature, the sciences, politics, entertainment, sport, commerce, the environment, and philanthropy. Where there is an existing representative body such as the BMA this could be used to determine eligibility. Where there is no representative body, an appropriate panel should be appointed for the same purpose.

If the proposal does go ahead in its current form, TLHS suggests that in addition to preservation of the wills of nationally important people (and any associated case papers), the wills of regionally and locally important people should also be preserved. Panels should be established representing historic counties, cities and boroughs and given the task of identifying suitable people whose wills should be preserved.

Despite any system such as the ideas outlined above, we believe that decisions on which wills and associated papers are retained will be controversial and that objections might be made to the inclusion or exclusion of particular people. For example, some people might object to classifying Rudyard Kipling’s will as of “historic interest” because of disagreement with the views expressed in his writing.

For these reasons we believe that any comprehensive and transparent system for designating wills “of historic interest” is likely to be cumbersome, expensive, controversial, and ultimately liable to miss people who subsequent generations regard as important.

Question 11: Do you agree that the Probate Registries should only permanently retain wills and codicils from the documents submitted in support of a probate application? Please explain, if setting out the case for retention of any other documents.

We do not believe that only wills and codicils should be digitised and retained. As previously noted in many of the above questions, we believe all documents produced by the process of proving a will should be regarded as public records and preserved indefinitely. A historian researching a particular case would wish to have access to all the documents in order to understand the full context. This could include the establishment of a time-line, to compare probate documents with other sources such as personal letters or to place the probate documents in the context of contemporary events. It is impossible to tell whether a particular document has information of interest without looking at it although for all documents, the date of production and the author will be significant. Equally, it is impossible to tell whether something currently regarded as unimportant might become important at some point in the future.

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On behalf of Thurrock Local History Society
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