LÉGITIME REFORM: LESSONS FROM DIFFERENT SYSTEMS OF PROTECTION FROM DISINHERITANCE (Part 1)

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This article is based upon a recent report by the Law Officers' Department on issues arising from proposals to reform or abolish légitime, Jersey's system for giving fixed minimum rights to spouses, civil partners and children where the deceased dies testate. Using a comparative law analysis, it is argued that the question is not one of modernity but of different philosophical approaches to the claims of relatives. Common law jurisdictions tend to use a "court-based discretion" system to provide a safeguard to dependants and close relatives; civil law jurisdictions tend to provide "fixed rights". Within such systems there is considerable variation as to what the rights should be. Jersey's légitime *system often fails to uphold fairness between children, suggesting a need for reform entirely separate from arguments as to whether should be a "fixed rights" system. However, the English court-based discretion system has considerable uncertainty in its application. If, on the other hand, the aim is to meet the financial services concern that "forced heirship" deters high net-wealth individuals coming to Jersey, this could readily be met through trust planning without creating concerns as to a two-tier system of law.*

1 *Légitime* is the Jersey law doctrine which provides what the Scottish Law Commission termed as "protection from disinheritance",[1] but has often been described perhaps more pejoratively as "forced heirship". This article is an edited version of the Law Officers' Department report on the subject, containing arguments for and against abolition and options for reform.

2 Most legal systems provide some measure of protection from disinheritance. Those who can claim protection vary, as does whether

[1] Scottish Law Commission, *Scot Law Com 215: Report on Succession*, 2009, 31–65 ("Scottish Law Commission Report 2009") (https://www.scotlawcom.gov.uk/files/7112/7989/7451/rep215.pdf, last accessed 3 April 2018).

such protection is given as of right. Broadly speaking, such systems of protection divide into two types—

(a) A "fixed rule system". Under such a system, certain relatives (typically children and spouses but sometimes the net is thrown wider) have clear entitlements as against testators that a court will uphold in any ordinary circumstance.

(b) A "court-based discretionary system". This is one where individuals with particular family or dependency relationships with deceased can challenge the adequacy of their recognition in the deceased's will. The court's order will not depend on any fixed rule but on a discretionary application of statutory or case-law criteria applied to the court's finding of the facts of the case.

3 Although both approaches effectively curtail testamentary freedom, a "court-based discretionary system" takes testamentary freedom as its starting point with relatives and dependants having to show a positive case as to why they should have inherited more than they did. A testator who wishes to wholly or partially disinherit a child, for example, can do so knowing that there is at least a chance (and often a considerable chance) that their wishes will be respected if challenged. A "fixed rule system" provides a positive entitlement to be recognised in a will. A testator wishing to disinherit someone with such entitlements will know that their intentions would not survive a challenge. For those reason, a "court-based discretionary system" will typically be seen as more conducive to testamentary freedom, although the extent to which it is so will depend on the precise nature of the systems being compared.[2] Controversy tends to focus on the position of children rather than spouses. The position of spouses as having a moral claim on the testator's property is different, and draws comparisons with the adjustive jurisdiction on divorce in that it is more a matter of how to meet the "legitimate aspirations of the spouse" instead of philosophical questions as to whether such aspirations arise as regards children.[3]

4 In Jersey, the children and spouses (by which we include civil partners) of the deceased have fixed minimum rights of inheritance in respect of a testator's movable property but children have no rights in

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[2] For example, the Danish system which gives fixed rights to a maximum of €135,000 will often in practice give greater freedom than a typical "court-based discretionary system" where a large estate will be vulnerable to far greater revision. As to the Danish system, see para 109, below.

[3] *E.g. Miller-Smith v Miller-Smith* [2009] EWHC 3623 (Fam) at para 22.

respect of a testator's immovable property. We shall set out later at length what these rights are—but the focus of this article will understandably be on the system of *légitime* as it affects children of the deceased.

5 The issue has arisen frequently in Jersey during the last 20 years. In 1999, the issue reached the direct attention of the States Assembly principally in the context of how Jersey's law of succession dealt with the position of illegitimate children. But in 2003, a unanimous decision of the States approved a proposition to adopt the English approach to protection against disinheritance as well as equalise the position of legitimate and illegitimate children. Despite that apparent unanimity, the Legislation Committee reined back when presented with a concrete plan to put such radical reform into effect. Suffice it to say, in 2010, only the legitimacy issue was dealt with by legislation, and the remainder of reform left for a still outstanding "phase two". The issue has re-emerged in the context of financial services interests: Jersey is seeking to attract people of high net wealth to come to the Island, and some of these are apparently deterred by the prospect of being obliged to leave large sums of money to their children.

6 The immediate spur for the Law Officers' review of Jersey's law on *légitime* was a paper in 2016 from Jersey Finance Ltd on the subject.[4] It also followed a consultation from Jersey's Trust Law Working Group which included questions on *légitime*.[5] It will be necessary to refer to those papers in order to consider adequately the objections to *légitime* that are at the fore of the debate in Jersey. However, questions raised in particular by Jersey Finance Ltd as to the importance of historical States Assembly decisions are of little importance to a consideration of inheritance law but are rather issues of Jersey's political and constitutional dynamics. The focus of this article is very much on the former.

7 A particular interest in the subject arises from Jersey's position as a mixed jurisdiction. The Island has a customary and civil law heritage sitting alongside an increasing common law influence. Part of the Island's customary and civil law heritage is that, like continental Europe, Jersey gives automatic inheritance rights to children and

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[4] *Jersey Finance Ltd Report on légitime*, 26 February 2016 ("*Jersey Finance Report*") reproduced at Appendix 2 of *Légitime Review*, *op cit*.

[5] Responses to Consultation on Trusts (Jersey) Law 1984—Relating to Légitime ("*Trust Law Working Group Consultation*"), reproduced at Appendix 1 of *Légitime Review*, *op cit.*

spouses. But, for some of the population, this will appear anomalous, being more familiar with the English approach of greater testamentary freedom, where it is only in cases of strong moral entitlement that a child will be able to successfully challenge a parent's will. The matter becomes particularly acute for Jersey as people of high net wealth move from England to the Island—and for some the possibility of being forced to leave millions of pounds to their children is a distinct disadvantage: hence the financial services interest in the subject.

8 This article will be split into two parts by reason of length. The first part will concentrate on the nature of legal protections against disinheritance and a comparative analysis of relevant jurisdictions. Between the sections dealing with those themes will be a Jersey-specific explanation of *légitime*, and a brief history of the recent consideration of it abolition and/or reform. Part two of the article will use the material in part one to set out the issues around the possible abolition or reform of *légitime*. The single most important theme is that there is no right or wrong answer, nor any solution that can claim to be more modern. Issues around testamentary freedom are ultimately ones of social values rather than objective right or wrong. Although Jersey cannot ignore the particular "financial services" issues thrown up by the position of incomers of high net wealth, it is a broad social question of what the people of Jersey believe is right for their own society.

A. Nature of the policy question

(i) *Introduction*

9 Before dealing with Jersey itself, it is useful to make a detour to Scotland (and thence to New Zealand) in order to explain something fundamental about the issues at hand: the fundamental decision is one of policy and social philosophy, not one of law.

10 It is worth emphasising that there are always limits on how far to look to other jurisdictions for inspiration or as justifying domestic law reform. There may be cultural differences which mean that what is morally obvious in one country may be anathema in a neighbour. This is never more true than in the area of testamentary freedom.

11 Albert Venn Dicey, in his treatise on the impact of public opinion on legislation, compared the stark differences between English and French attitudes on testamentary freedom[6]—

[6] Dicey, *Lectures on the Relation between Law and Public Opinion during the 19th Century*, 2nd edn (London: Macmillan, 1919), at 57, 59.

> "In truth, the equal division of a man's property among his descendants or his nearest relatives at his death, though almost essential to the maintenance of small estates, is thoroughly opposed to that absolute freedom of testamentary disposition to which Englishmen have so long been accustomed that they have come to look upon it as a kind of natural right . . .
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> French democracy is opposed to differences of rank involving political inequality. The very foundation of the French political and social system is the existence of a large body of small landed proprietors, or, to use English expressions, of small freeholders. Testamentary freedom, in the English sense of the word, is unknown. The systematic and equal division of a deceased person's property among his family thoroughly corresponds with French ideas of justice, and prohibits that formation of large hereditary estates which has long been a marked feature of English social life."

12 It was not that England was right and France was wrong (or *vice versa*). It was rather that history had made local attitudes and behaviour different. But that we should not presume that testamentary freedom is "modern" and fixed rights are archaic is shown by the BBC recently including two posters denouncing the results of testamentary freedom amongst a selection of suffragette posters. Testamentary freedom meant the right to leave widows penniless, and to favour a single son over any number of daughters.[7] This contrasted with France, where neither scenario was possible.

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[7] "The 100-year-old protest posters that show women's outrage", *BBC Online*, 2 February 2018 (http://www.bbc.com/news/in-pictures-42875095). The particular posters said—

> "HOW THE LAW 'PROTECTS THE WIDOW.'
> WIDOW: 'Can nothing alter my husband's will?'
> LAW: 'No madam, a man my leave his money to whom he likes but you must maintain your children, that is one of the laws of England."

> "HOW THE LAW 'PROTECTS THE DAUGHTERS.'
> ENGLISH GIRLS (crying) 'Nurse says we had better get used to baby brother taking our things, because when we grow up we sha'nt have anything, he will take it all.'

13 This must be borne in mind when the question of succession law reform is considered. It is not a question of what works in England, or what is right for England; nor what is right or works for Scotland. It is a matter of what is right and works for the people living in Jersey.

(ii) *Scottish review of its system*

14 The Scottish Government in a recent consultation on its very similar area of law, having noted the lack of any support in Scotland for absolute testamentary freedom, said[8]—

> "In terms of any changes to the law, the tension therefore lies between striking the appropriate balance between individuals having freedom to leave their property to whoever they want and giving family some rights to receive an inheritance."

15 This is important to bear in mind. It is not simply a question of whether Jersey should support testamentary freedom by enacting a court-based discretionary system of "reasonable provision", as exists in England or Wales, or maintaining the existing system of *légitime*. Unless the policy decision is to implement absolute testamentary freedom, any system adopted will both infringe testamentary freedom, and also be limited in terms of the protection given to spouses/civil partners and children. The question, which is quintessentially a policy question, is where to strike the balance. There are many variants on the basic "court-based discretion" and "fixed rights" systems—it is not necessarily a binary choice between English legislation and the Jersey *status quo*.

16 Very detailed work by the Scottish Law Commission and the Scottish Government highlights the currents and cross-currents of different opinions in this area. At the heart of the idea of protection against disinheritance is the idea that an individual can be meaningfully described as entitled to receive anything in their parent's will. The Scottish Law Commission said the following on the concept of disinheritance[9]—

FRENCH GIRLS: 'What a shame; the brothers and sisters have equal shares in our Country."

[8] Scottish Government, *Consultation on the Law of Succession*, June 2015, at para 3.2 ("*Scottish Government Succession Consultation*") (http://www.gov.scot/Publications/2015/06/7518/4, last accessed 19 April 2017).

[9] Scottish Law Commission, *Discussion on Succession*, August 2007, at para 3.1 (http://www.scotlawcom.gov.uk/files/1012/7885/3181/dp136.pdf, last accessed 3 April 2018). See also for essentially the same comments word for

> "3.1 In one sense persons cannot be disinherited as no-one has an indefeasible right to succeed to another's estate. However, we have seen that when a person dies intestate the law identifies the members of the deceased's family who are his heirs and who are entitled to succeed to the estate. But if the deceased makes a will, these default rules are displaced and the estate will be distributed to the beneficiaries chosen by the deceased in his will. To that extent we can say that the persons who would have succeeded under the rules of intestate succession have been disinherited by the will. Further, it can be argued that certain relatives of the deceased, for example a spouse or a civil partner or children, have a moral right to inherit at least a share of the deceased's estate. If the deceased fails to make provision for them in his will, such persons may feel that they have been disinherited. While neither rationale is entirely compelling, nevertheless, the idea of disinheritance is one in general use and we have decided to use the term."

17 The Scottish government noted that there were strong feelings amongst some parents that "they cannot prevent children having a right to part of their estate on death, especially those who are estranged".[10] The possibility of creating different entitlements for children depending on whether they were dependent or not was considered.[11] Yet the government also noted that "in discussion only one group came out very strongly in favour of not protecting adult children."[12]

18 What needs to be underlined is that the Scottish Law Commission found that opinion was so varied in Scotland that it did not feel able to make a recommendation. The Scottish government recorded in its 2015 consultation[13]—

> "The responses they received were 'sharply divided' and the Commission did not make a specific recommendation in this regard. Instead, the Report offers two options for further consideration."

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word in the final report, *Scottish Law Commission Report 2009*, *op cit*, at para 3.1.

[10] *Scottish Government Succession Consultation*, *op cit*, at para 3.25.

[11] *Ibid*, at paras3.17–3.24.

[12] *Ibid*, at para 3.13.

[13] *Ibid*, at para 3.11.

19 We shall consider those recommendations and the current Scottish system in due course.

(iii) *The New Zealand Law Commission*

20 A report by the New Zealand Law Commission set out the competing factors for why courts might intervene in respect of the disinheritance of children, demonstrating that some factors support a conclusion of equality of inheritance, others suggest provision according to need, and others support the denial of inheritance on behavioural grounds. The New Zealand Law Commission said[14]—

> "200. Courts appear to have before them the following objectives. Any one of them may prove decisive in the particular case.
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> - *To acknowledge the family relationship*. The objective here is to symbolise the bonds which ought to exist in the ideal family, and to strengthen them by insisting that the will-maker acknowledge them without regard to the real state of affairs between parent and child.
> - *To reward the child's good conduct or compensate the child for the will-maker's bad conduct*. The objective here is to encourage the child to act dutifully to the will-maker, and to compensate the child for defects in its upbringing.
> - *To protect a child who is in need*. The objective here is to help people in need, and to symbolise the family as the source of that help.
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> 201. Two things may usefully be said about these policy objectives. The first thing is that two of them at least (the first and third) draw on 'symbolic' values, there being no suggestion that any specific improvement in family life or in the public welfare is necessarily achieved by an award, beyond saving the State the cost of welfare payments. The social effects of what is being done are likely to be speculative. True, symbolism can be important and useful if it is known and acted upon by the general public in ordinary life. However, it is not clear that the present judicial practice is known and acted upon by the general public in ordinary life.

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[14] *New Zealand Law Commission Discussion Paper*, Preliminary Paper 24, Succession Law, Testamentary Claims*, August 1996 (*"NZ Law Commission Discussion Paper"). (http://www.nzlii.org/nz/other/nzlc/pp/PP24/PP24-7.html, last accessed 19 April 2017).

> 202. The second is that the objectives conflict, even when resolving the most basic family protection issues. Take for example a will-maker who has two children, A and B. A is in need, B is not. Neither has been attentive to the will-maker in the will-maker's old age. Both have been disinherited. Under the first objective, they would share equally in the estate, or part of it. Under the second objective, neither would get anything. Under the third objective, only A would receive a share. Which of these objectives is to be preferred, according to current practice?"

21 This is another fair account of the different considerations that are valid to take into account when adopting or amending a system of protection against disinheritance.

(iv) *New Zealand thesis*

22 A useful summary of arguments and a demonstration of the cultural dynamic described by Dicey is found in a 2010 Masters' thesis from New Zealand. The question under consideration in the relevant section was the advantages of a "fixed rule system" where the protection from disinheritance was based on set legal rights, and a "court-based discretionary system", where the system was based on a court's decision as to fairness or reasonableness measured according to qualitative criteria. The thesis said[15]—

> "The relative merits and deficiencies of both systems have been discussed in recent reports by the Scottish Law Commission and by the New South Wales Law Reform Commission. The English Law Commission also considered that it would be undesirable to change laws of estate distribution in such a way as to cause more applications to Court for greater provision. The comparative merits and defects of the two contrasting systems are:
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> - The advantages of a fixed rule scheme are certainty and convenience. People can prepare wills with knowledge of the likely outcome. The delays, costs and inconvenience of litigation are minimised as are the costs and time involved in estate administration.
> - The major disadvantage of a fixed rule scheme is rigidity. Unlike the court-based discretionary system, factors such as

[15] Kelly, "An Inheritance Code for New Zealand", Faculty of Law, Victoria University of Wellington University, 2010, at 32–33 (http://research archive. vuw.ac.nz/xmlui/bitstream/handle/10063/1403/thesis.pdf?sequence=2, last accessed 19 April 2017).

the conduct of the parties and the competing needs of claimants and beneficiaries are usually irrelevant in fixed rule schemes.

- Another disadvantage of a fixed share system is that it is usually limited to a small number of classes of claimants. Unlike a court-based discretionary system, a fixed share system usually provides for only a small list of parties.
- A further disadvantage of a fixed rule scheme is that an owner of property is deprived of the ability to decide what is to happen on death to property that in many cases he or she has acquired and developed. An unwanted and possibly undesirable regime is imposed on the property owner. This has meant, in the case of farms or large blocks of land, fragmentation of ownership amongst a person's heirs rather than retention by an heir of choice; this has led in turn to inefficient and problematic use of the land.
- The advantages of a court-based discretionary system are flexibility and the ability to take into account many factors in different situations. Also, awards can take various forms such as lump sum payments, transfers of property or periodical payments.
- The disadvantages of a court-based discretionary system are uncertainty and inconvenience. While previous decisions provide some guidance, the outcome depends very heavily on the particular circumstances. A discretionary system also provokes litigation and the consequent cost, delay and upheaval at a time when the family are still adjusting to bereavement.
- Experience with court-based discretionary systems has shown that the class of those who can claim widens according to changing social mores. As one report notes:

> Once a Court is given power to override the testator's discretion and impose its own discretion in accordance with broad principles of equity, it becomes difficult to argue that such principles should be restricted only to some specific cases and not to others. Non-relatives for instance may be more deserving of and dependent on the testator's bounty than relatives.

The Scottish Law Commission favoured retention of a fixed rule scheme for surviving spouses and civil partners but recommended a discretionary court-based system for dependent children and cohabitants. In contrast, the New South Wales Law Reform

> Commission favoured retention of a court-based discretionary system; however, it also recommended reduction of the classes of potential claimants under this system."

In looking at the system, it is not just that each approach has its own advantages and disadvantages but that each system mirrors the other in its advantages and disadvantages. A fixed-rule system gives certainty at the cost of rigidity; turn these characteristics on their heads, and we have a court-based discretionary system offering flexibility at the cost of unpredictability.

23 The Scottish Law Commission would, as we shall see, present options for different levels of change, but *retaining* a fixed rule system. The New South Wales Law Reform Commission proposed retaining its court-based discretionary system. Although both commissions were addressing the same dilemmas, they stayed close to the ideas which were established in their locality.[16]

B. Nature of *légitime*

(i) *General rules*

24 The historic nature of *légitime* is as a protection against disinheritance of spouses (and now also civil partners) and children (which now includes illegitimate children). Although the principle dates back centuries in Jersey law, the entitlements are now codified by art 7 of the Wills and Succession (Jersey) Law 1993.

25 The Jersey Law Course Succession Study Guide, 2016–17, succinctly explains the basic legal entitlements.

> "Three situations need to be considered:
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> 1. Where the testator is survived by a spouse or civil partner only;
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> 2. Where the testator is survived by a spouse or civil partner and issue; and
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> 3. Where the testator is survived by issue only.
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> In the first case the surviving spouse or surviving civil partner shall be entitled to claim *légitime* of the household effects and two-thirds of the rest of the net movable estate.

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[16] The writer of the New Zealand thesis similarly supported the retention of the New Zealand court-based discretion system on the basis of it being well-established in New Zealand and in keeping with local opinion, see Kelly, "An Inheritance Code for New Zealand", *op cit*, at 34

> In the second case the surviving spouse or civil partner shall be entitled to claim *légitime* of the household effects and one-third of the rest of the net movable estate, and the issue shall be entitled to claim one-third of the rest of the net movable estate.
>
> In the third case the issue shall be entitled to claim as légitime two-thirds of the net movable estate."

26 Historically, *légitime* did not apply as between a father and his illegitimate children. Considerable doubts as regards the moral justification—and European Convention of Human Rights compatibility—were raised. In particular Professor Meryl Thomas advised the Jersey Community Relations Trust that there was no justification in terms of human rights jurisprudence for excluding illegitimate children who have been recognised by their father.[17] Articles 8A and 8B of the Wills and Succession (Jersey) Law 1993 were inserted so that *all* illegitimate children stand alongside legitimate children for all succession purposes.[18]

27 It is also established Jersey law that adopted children are treated equally with natural children for these purposes.[19]

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[17] Thomas, *Human Rights and the Law of Succession in Jersey: A Report to Consider the current law of Succession and the Human Rights (Jersey) Law 2000*, 12 October 2009 (accessed via http://www.jerseycommunityrelations.org/What-We-Do/Inheritance/, last accessed 13 April 2017).

[18] The point raised by Professor Thomas is the same that has been wrestled with in respect of the question of parental responsibility for unmarried fathers, *i.e.* that the relationship between unmarried fathers and their children ranges from being identical to that of married fathers to not even knowing of the child's existence. Whilst it was open to the States Assembly when enacting the Wills and Succession (Amendment) (Jersey) Law 2010 to make the rights of illegitimate children dependent on recognition, difficult issues would have arisen as to where to draw the line. The possibility of different approaches can be seen from the United Kingdom, where the Children Act 1989 and the Child Support Act 1991 took diametrically opposed approaches depending on whether the question was one of "parental responsibility" or, as with child support, enforceable duties.

[19] See *Lee v Lee* 1965 JJ 505. The South African adoption fell outside the specific provisions of the Adoption of Children (Jersey) Law 1947, as amended but this did not alter the importance the Royal Court placed on the principle that adopted children are to be seen as no different from natural children.

28 The only exception to the principle that all children of the deceased are treated equally for *légitime* purposes is when the legal link between biological parent and child is broken by a subsequent adoption. Where children are adopted, they become a full part of their new family, and have no legal relationship with the biological family.[20]

(ii) *Position of grandchildren*

29 For simplicity, this paper will generally talk in terms of "children" rather than "issue". However, it should be stressed that, for the purposes of *légitime*, if a child dies before the parent, then that child's share will itself be divided equally amongst his or her own children, if any. This is called *representation.* Where a child of the testator has predeceased the testator, then that child's own children (*i.e.* the grandchildren of the deceased) stand in his or her shoes. The same principle applies if both a child and a relevant grandchild have predeceased the testator.[21]

30 However, for present purposes, it is doubtless sufficient to think solely in terms of the entitlement of spouses, civil partners and children. Where it is possible without creating difficulty, reference may be made to descendants—but normally the testator's own children will be alive, so more distant descendants (*i.e.* grandchildren, great-grandchildren, *etc*) are irrelevant at that point.

(iii) *Relevant property*

31 It must be emphasised that *légitime* applies only to the movable estate—which means everything that Jersey law does not class as "immovable property". This means everything other than the ownership of land in Jersey, entitlements under leases in Jersey land of over 9 years, and a few sundry rights which are less likely to be

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[20] As with illegitimacy, it is difficult to have a rule that satisfactorily addresses all scenarios. Adopted children may come to have very close relationships with a biological parent during adult life, and children raised entirely by their biological parents may lose all relationship in adult life (*e.g. Ilott v Blue Cross* [2017] UKSC 17).

[21] Hence, Anne (a widow) dies but leaves all her movable property to the JSPCA. She has two children, Brian and Cuthbert. Each is entitled to take an equal share of the *légitime*, *i.e.* one third of the movable estate. If Brian predeceases her, having no spouse or civil partner but leaving two children, his one third share will be split equally between his children.

relevant.[22] We shall generally assume that immovable property means land. *Légitime* thus applies to, for example—

(a) all bank accounts;

(b) all shares;

(c) any motor vehicles;

(d) all livestock;

(e) antiques;

(f) boats;

(g) aeroplanes.

32 Irrelevant for *légitime* purposes will be a house in Jersey, or the rights under a long lease. Such property is immovable property, and thus falls outside the scope of *légitime*.

33 The only protection against disinheritance in Jersey as regards immovable property is given by the rights of dower and rights in the nature of dower enjoyed by surviving spouses and civil partners. Under such rights, subject to narrow exceptions, the survivor is guaranteed a *usufruit* (essentially a life interest) in the matrimonial home regardless of whether the deceased had provided otherwise in his or her will.[23] Other than this, a Jersey testator has absolute testamentary freedom as regards land in Jersey—which for those other than the very rich means absolute freedom as regards the bulk of the testator's property.

34 The effect of this is that it is possible for a testator to avoid *légitime* by buying land in Jersey and thus converting movable property into immovable property.[24] This would, of course, often have potential inconvenience to the testator in converting in their lifetime liquid assets into a speculation on property.[25] Such a strategy is only

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[22] *E.g.* rights to receive *rentes* and rights under certain *hypothèques*.

[23] See art 5(1) of the Wills and Succession (Jersey) Law 1993. Under art 8 of the 1993 Law, the surviving spouse will not have the entitlement if the couple were living apart at the time the deceased died and either (a) there was a judicial separation, or (b) the surviving spouse had left the deceased without cause.

[24] See Hanson and Corbett, "Forced Heirship—Trusts and other Problems" (2009) 13 *Jersey and Guernsey Law Review* 174, at 184.

[25] There may be a greater or lesser inconvenience. If a testator has £500,000 in liquid assets and a £1m house with a £500,000 loan secured by way of a

available insofar as a testator can in practice convert their liquid assets into Jersey property, which will be less practical for those of high-net wealth who wish to avoid *légitime* in respect of potentially very many millions. It would not just be the availability of sufficient Jersey property but the disadvantage of turning doubtless diverse investment portfolios in a single type of asset.

(iv) ***Equality between entitled persons and "disposable third"***

35 It should be noted that the consequence of *légitime* is not just protection against disinheritance but also achieving a significant amount of equality between the affected persons—

(a) Where there is a spouse/civil partner and children, the amount that goes to the spouse/civil partner is the same as the entirety that goes to the children.

(b) Where there is an entitlement for children, the entitlement is to equal amounts.

36 However, *légitime* applies to two thirds of the movable estate. It does not apply to the remaining one third, which can be given to favoured children or to third parties. In respect of this one third share ("the disposable third"), the testator has complete testamentary freedom. At all events a testator may—deliberately—exceed his or her testamentary powers but specifically request in the will that his or her wishes be respected. The will remains effective in such a case if neither the spouse/civil partner nor children seek to attack the will and reduce it *ad legitimum modum*.

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hypothec, by using the liquid assets to pay off the secured lending, £500,000 in the movable estate has become part of the immovable estate.

Action for reduction of the will "ad legitimum modum"

37 Where a person has not been given their entitlement under *légitime*, they may bring an action for reduction of the bequests in the will so as to meet the legal entitlement. This procedure is known as *reduction ad legitimum modum*. Writing in the *Jersey Law Review*, Advocate Keith Dixon described the procedure as follows[26]—

> "In Jersey an action seeking the cancellation of a will or a reduction *ad legitimum modum* of the bequests it contains is started by means of a simple summons; a very cheap and quick means of starting the legal process. Supporters of forced heirship regimes have contrasted this with the fact that a judicial discretion system requires a lawsuit to be activated, thus, they argue, increasing litigation in already overworked judicial systems."

38 As will be seen later, and as set out by Advocate Keith Dixon, this is a key advantage of the present system.

(v) *"Rapport à la masse"*

39 *Légitime*, or rather its direct Scottish equivalent of "legitim" is described by the Scottish Law Commission as "protection against disinheritance". Historically, many parents have often wished to disinherit a child, or at least to favour one child over the others above and beyond what can be done with the "disposable third". Parents have thus often sought to avoid the requirements of giving *légitime* to their children by giving gifts when still alive. It is something addressed in one Jersey's oldest sources of law, *L'Ancien Coutumier*[27]—

> "*L'en doibt scavoir que, quand le père a plusieurs fils, il ne peut pas faire de son héritage l'un meilleur de l'autre: mais après sa mort, tout ce qu'il aura donné à aulcun d'eux sera rapporté à partie entre eulx*."
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> [Trans: Please note that when a father has several sons, he cannot confer a benefit on one son to the prejudice of the other: for after his death, all that he had given to any one of them shall be brought back into the estate and divided equally.]

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[26] K Dixon, "*Légitime*—A Time for Reform?" (2002) 6 *Jersey Law Review* 247, at 261.

[27] Chapter 36, translation from *Jersey Law Course, Succession Study Guide*, 2016–7, at 21.1.

40 To meet this problem, customary law allows a remedy known as *rapport à la masse*. It is unnecessary to deal with the detail of this doctrine. Those who would be entitled to *légitime* but received gifts from the deceased prior to his or her death, are viewed as having received an advancement on their inheritance. Their co-heirs—*i.e.* the others who are entitled to *légitime*—are entitled to apply to the court to make the beneficiary return the property or equivalent value to the estate, so that it can be shared out equally.[28]

41 It should be noted—

(a) Money given by a parent in respect of clothing, food, education and the like do not count as gifts for these purposes.[29]

(b) The will is valid until challenged by an aggrieved person. It is quite normal for wills to go unchallenged where the family agree that one sibling is entitled to more, or there is no objection amongst the children to their mother taking everything.

(c) The doctrine applies in respect of gifts to spouses as well as to children.[30]

(d) In practice, applications for *légitime* and/or *rapport à la masse* tend to be made by children in respect of younger second wives. This is partly because these tend to be more difficult situations in terms of family relations, and also because the second wife will be free to disinherit her step-children even in respect of ancestral property formerly belonging to the father.[31]

(e) There is authority that an ungrateful son, or acts of conspicuous neglect by a spouse, may lead to a loss of a claim for legal rights against a testator. There is the case of *Le Gros v Paroisse de la Trinite*,[32] where a wife who deserted her husband on his deathbed lost her claim to *légitime*. The same was the case where a son made an

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[28] But note *Valpy dit Janvrin v Valpy dit Janvrin* CR 27 November 1716 where the defendants were permitted to rest on their advances on condition that they did not participate in the moveable estate.

[29] Bérault, *La Coutume Reformée du Pays et Duché de Normandie*, when considering art 434.

[30] *Tarr v Laurens* (1926) 234 Ex 207, and *Channing v Harrison* 1967 JJ 84.

[31] If the children's mother inherits from the father more than the rules of *légitime* allow at the expense of those children, the children are likely to still inherit from the mother.

[32] (1803), described in Le Gros, *Traité du droit coûtumier de L'Ile de Jersey* (1943), at 443.

unfounded accusation that his father had committed a crime, see *Maret v Dolbel*.[33] A similar principle is found in the French and other Civil Codes. However, even assuming that the doctrine has survived the recent statutory codification in the Wills and Succession (Jersey) Law, such a doctrine would only apply in respect of conduct which today would be similarly scandalous. It would not stretch to a parent wishing to restrict a child's inheritance on the basis that they are a wastrel or a do-nothing, let alone on the basis that the parents believe children should stand on their own two feet.

(f) There is a statutory restriction in respect of spouses and civil partners. They cannot claim *légitime* where they are separated from the spouse under a court separation order. The same applies where there is separation without such an order but only where the surviving spouse/civil partner deserted the deceased "without good cause".[34]

(g) The principle does not apply in respect of gifts to third parties.

42 *Rapport à la masse* is based on the theory that gifts from parent to child are an *avancement* of succession, *i.e.* that the child is receiving their inheritance early. It thus achieves equality between the children, and upholds the balance the law seeks between provision for surviving spouses/civil partners and children. This theory, and its difficulties, were set out by Lord President Strathclyde when describing the direct equivalent in Scottish law, the doctrine of c*ollatio bonorum inter liberos* [35]—

> "Its basis is a double fiction. It assumes that the father has paid a part or the whole of his indebtedness at a time when no relationship of debtor and creditor existed between the father and the child. It further assumes that the payment is made out of the legitim fund although confessedly the legitim fund is at the time non-existent."

The Scottish court thought that, given its artificial assumptions, the doctrine could not be developed by the courts by analogy.

C. Comparative analysis

43 The analysis in this section does not purport to be a full comparative analysis of all potentially relevant jurisdictions. It deals with the position in the United Kingdom and the remainder of the

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[33] (1657), described, *ibid*, at 47.
[34] Articles 8 and 8AA of the Wills and Succession (Jersey) Law 1993.
[35] *Coats Trustees v Coats* 1914 SC 744 at 748–749.

Channel Islands. It deals with two other Commonwealth jurisdictions where the matter has been subject to significant recent consideration. From there it moves to an analysis of the law in all other EU jurisdictions—this part of the review was able to be exhaustive because of the ease of reference provided by the European Union's "e-justice" website.

(i) *England and Wales*

44 The system in England and Wales is of particular interest in this paper. It was the system essentially recommended to be adopted by the States Assembly in P.121/2003 at the height of Jersey discussions on the reform of *légitime*, although subsequent legislative action was limited to extended protection to illegitimate children.

45 The English law in respect of protection against disinheritance was recently explained by the UK Supreme Court as follows[36]—

> "1. Unlike some other systems, English law recognises the freedom of individuals to dispose of their assets by will after death in whatever manner they wish. There are default succession rules in the event of intestacy but by definition those only come into play if the deceased left no will. Otherwise the law knows of no rule of automatic succession or forced heirship. To this general rule, the statutory system of family provision imposes a qualification. It has provided since 1938 for the court to have power in defined circumstances to modify either the will or the intestacy rules if satisfied that they do not make reasonable financial provision for a limited class of persons. That power was first introduced by the Inheritance (Family Provision) Act 1938 ('the 1938 Act'). The present statute is the Inheritance (Provision for Family and Dependants) Act 1975 ('the 1975 Act').
>
> 2. The key features of the operation of the 1975 Act are four. First, it stipulates no automatic provision; rather the will (or the intestacy rules) apply unless a specific application is made to, and acceded to by, the court and a specific order for provision is made. Second, only a limited class of persons may make such an application; they are confined to spouses and partners (civil or de facto), former spouses and partners, children, and those who were actually being maintained by the deceased at the time of death.

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[36] *Ilott v Blue Cross*, *op cit*, at 2 decision of Lord Hughes (Joined by Lord Neuberger, Lady Hale, Lord Kerr, Lord Clarke, Lord Wilson and Lord Sumption).

> Third, all but spouses and civil partners who were in that relationship at the time of death can claim only what is needed for their maintenance; they cannot make a claim on the general basis that it was unfair that they did not receive any, or a larger, slice of the estate. Those three features are laid down expressly in the 1975 Act. The fourth feature is well established by case law both under this Act and its predecessor of 1938. The test of reasonable financial provision is objective; it is not simply whether the deceased behaved reasonably or otherwise in leaving the will he did, or in choosing to leave none. Although the reasonableness of his decisions may figure in the exercise, that is not the crucial test."

46 The key advantages of the system are in its flexibility both in terms of who can apply for relief, in the relief to be given, and in the relevant factors.

47 Whereas Jersey's system of *légitime* has clear and precise boundaries as to who may make an application, the English system provides for the following to make an application[37]—

> "(a) the spouse or civil partner of the deceased;
>
> (b) a former spouse or former civil partner of the deceased but not one who has formed a subsequent marriage or civil partnership;
>
> (ba) [a person living in the same household as husband or wife];
>
> (c) a child of the deceased;
>
> (d) any person (not being a child of the deceased) [who in relation to any marriage or civil partnership to which the deceased was at any time a party, or otherwise in relation to any family in which the deceased at any time stood in the role of a parent, was treated by the deceased as a child of the family;]
>
> (e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased . . ."

48 Hence, this allows for consideration of the position of step-children, co-habiting partners, and the claims of financial relationships of dependency which may arise from other relationships.

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[37] Inheritance (Provision for Family and Dependants) Act 1975, s 1(1).

49 In terms of what may be ordered, there is again considerable flexibility[38]—

> "(a) an order for the making to the applicant out of the net estate of the deceased of such periodical payments and for such term as may be specified in the order;
>
> (b) an order for the payment to the applicant out of that estate of a lump sum of such amount as may be so specified;
>
> (c) an order for the transfer to the applicant of such property comprised in that estate as may be so specified;
>
> (d) an order for the settlement for the benefit of the applicant of such property comprised in that estate as may be so specified;
>
> (e) an order for the acquisition out of property comprised in that estate of such property as may be so specified and for the transfer of the property so acquired to the applicant or for the settlement thereof for his benefit;
>
> (f) an order varying any ante-nuptial or post-nuptial settlement (including such a settlement made by will) made on the parties to a marriage to which the deceased was one of the parties, the variation being for the benefit of the surviving party to that marriage, or any child of that marriage, or any person who was treated by the deceased as a child of the family in relation to that marriage;
>
> (g) an order varying any settlement made—
>
> (i) during the subsistence of a civil partnership formed by the deceased, or
>
> (ii) in anticipation of the formation of a civil partnership by the deceased,
>
> on the civil partners (including such a settlement made by will), the variation being for the benefit of the surviving civil partner, or any child of both the civil partners, or any person who was treated by the deceased as a child of the family in relation to that civil partnership . . ."

50 There is thus an obvious argument that this provides something better than the "one size fits all approach" of fixed percentages of the movable estate.

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[38] Inheritance (Provision for Family and Dependants) Act 1975, s 2(1).

51 As for the question of reasonable provision, the Act is clear that the court should take into account issues both of financial need and the nature of the relationship between the deceased and the person challenging their provision under the will or in intestacy, as well as competing claims of other persons:[39]

> "(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
>
> (b) the financial resources and financial needs which any other applicant for an order . . . has or is likely to have in the foreseeable future;
>
> (c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
>
> (d) any obligations and responsibilities which the deceased had towards any applicant for an order . . . towards any beneficiary of the estate of the deceased;
>
> (e) the size and nature of the net estate of the deceased;
>
> (f) any physical or mental disability of any applicant for an order . . . or any beneficiary of the estate of the deceased;
>
> (g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant."

Advantages in respect of this model

52 If there is to be a shift towards testamentary freedom and against fixed minimum entitlements, then there are advantages to Jersey in adopting this model:

(a) It provides for flexibility of response.

(b) It also deals with questions of reasonable provision, which is only partly a function of the fact of a parental or spousal relationship.

(c) If the policy is to create a discretion, the English model comes with an accessible jurisprudence—albeit a jurisprudence of somewhat uncertain application.

(d) Insofar as there is concern that people of high net wealth are deterred from moving to Jersey due to restrictions on testamentary

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[39] Inheritance (Provision for Family and Dependants) Act 1975, s 3(1).

freedom, most such persons will be moving from England and Wales so will be familiar with the approach.

(e) If the policy is to place greater emphasis on testamentary freedom, the English approach as noted by the Supreme Court in *Ilott* has such freedom as its starting point.

53 The most important arguments in favour of the English approach are ones of policy, and even personal philosophy. It is the question of whether the claims of spouses/civil partners and children are matters which ought to be recognised as routine, or whether testators should have freedom over their own property and be entitled to decide where their money should go. For example, as noted above, the doctrine of *légitime* historically allowed for the Royal Court to reject claims by children who have behaved badly towards their parents.[40] In the English system, it is the testator who decides on issues of worthiness, and only in exceptional cases (where usually need comes much higher than questions of what is deserved) will the court become involved.

54 If the policy decision is in favour of testamentary freedom but reserving a power for the court to make adjustments in exceptional cases, then the English approach is to be recommended as providing an established model with an accessible jurisprudence. If this is the policy, then it might be thought of as the only option realistically in play. It would doubtless be possible to make changes to the list of potential beneficiaries but the core concept of "reasonable provision" would need to be adopted.

Need for inclusion of immovable property

55 It must be stressed that the English approach treats land and personal property just the same, whereas the current Jersey system is only concerned with movable property.[41]

56 It would be illogical to introduce the English approach to Jersey without applying it both to the movable and immovable estate. Currently, the system of *légitime* does not take account of the division of immovable property.[42] Hence, no notice is taken of whether there is

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[40] There are arguments as to how far such principles translate into the modern era—and, indeed, how far they remain at all given the codification of *légitime* in the Wills and Succession (Jersey) Law 1993.

[41] There are separate provisions in respect of the rights of surviving spouse and civil partners under the Wills and Succession (Jersey) Law 1993.

[42] *Valpy v Valpy* (1716) 1 CR 66.

a fair division across immovable and movable property taken as a whole: a child or widow may claim that they have been denied their proper minimum share of the movable property regardless of how much they might have been favoured in respect of the immovable property. Unsurprisingly, as will be seen later that the Scottish Law Commission has proposed reforming Scotland's equivalent to *légitime* ("legitim") so as to include the entirety of the estate. Conversely, "reasonable provision" as a concept must address the entirety of the estate.

How has the English/Welsh system performed in practice

57 In 1979, when legislation for Northern Ireland was laid before the House of Commons to introduce an equivalent of the Inheritance Act 1975, a question was asked as to how well the legislation had worked in England and Wales. The Minister replied[43]—

> "The right hon. Member for Down, South asked about the experience in England and Wales. The Lord Chancellor is content with the operation of this legislation in England and Wales since 1975. We hope that there will be a similar happy experience in Northern Ireland."

As will be seen, there are doubts in the experience in England and Wales has proven quite as happy in the long term as it appeared in 1979.

58 Much of the following discussion of the disadvantages of the English approach will revolve around the recent case of *Ilott v Blue Cross*.[44] The facts are usefully summarised in an article that followed the Court of Appeal decision[45]—

> "Melita Jackson died in 2004, leaving an estate worth £486,000. In 2002, she had made a will in which she left a £5,000 legacy to the BBC Benevolent Fund and divided the remainder of her estate between the Blue Cross, the Royal Society for the Protection of Birds, and the Royal Society for the Prevention of Cruelty to Animals ('the Charities'). Mrs. Jackson had also written a letter of wishes in which she explained her decision to exclude her only daughter, Heather, from her will. Heather had

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[43] Hansard, 17 July 1979 (see http://hansard.millbanksystems.com/commons/1979/jul/17/northern-ireland-inheritance, last accessed 18 April 2017).
[44] *Ilott v Blue Cross, op cit.*
[45] Sloan, "The 'Disinherited' Daughter, and the Disapproving Mother" (2016) 75 *Cambridge Law Journal* 31, at 31.

> left home in 1978 at the age of 17, without her mother's knowledge or agreement, in order to live with Mr. Ilott, whom Heather later married. Mrs. Jackson clearly disapproved of her daughter's choice of lifestyle. Heather and her husband had five children (the last one living at home, being due to go to university in 2015) and lived in straitened financial circumstances. For example, Heather never went on holiday, found it difficult to afford clothes for the children and a range of food, and possessed many items that were old or second-hand. Despite attempts at reconciliation, mother and daughter were estranged for some 26 years, and Heather was fully aware before Mrs. Jackson's death that she was due to be excluded from the will."

59 The case had a long history, which amounts to this—

(a) At first instance, the daughter was awarded £50,000 from the estate worth £486,000.

(b) On appeal to the Court of Appeal, the award was increased to £143,000, with an option to claim a further capital sum of £20,000. This would have enabled her to purchase the housing association property in which she lived.

(c) At the Supreme Court, the original decision was reinstated.

60 Perhaps the outstanding point to be gathered from the decision was that the Supreme Court held that widely different decisions could have been made by the first instance judge, and would have been upheld on appeal. At para 44 of the main judgment we see that the Supreme Court recognised that a trial judge could have (like the Court of Appeal) decided that the daughter should receive enough to solve her housing needs—

> "Plainly some judges might legitimately have concluded that this was a case in which reasonable financial provision for the claimant should be made by way of housing . . ."

61 But at para 35 of the decision we see that the judge could have held that there was no existing relationship between mother and child in the circumstances to ground *any* claim, and that the daughter's application could have been dismissed entirely—

> "Some judges might legitimately have concluded that the very long and deep estrangement had meant that the deceased had no remaining obligation to make any provision for her independent adult daughter . . ."

62 Hence, the *Ilott* litigation could have been decided by the daughter receiving anything from £0.00 to £143,000 or any amount in between.[46]

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[46] Baroness Hale at para 65 expressly recognised the range of legitimate outcomes of the case, all depending on the approach chosen by the first-instance judge—

> "65. So what was he to do? A respectable case could be made for at least three very different solutions:
>
> (1) He might have declined to make any order at all. The applicant was self-sufficient, albeit largely dependent on public funds, and had been so for many years. She had no expectation of inheriting anything from her mother. She had not looked after her mother. She had not contributed to the acquisition of her mother's wealth. Rather than giving her mother pleasure, she had been a sad disappointment to her. The law has not, or not yet, recognised a public interest in expecting or obliging parents to support their adult children so as to save the public money. Thus it is not surprising that Eleanor King J regarded this as the reasonable result . . . The Court of Appeal allowed the appeal on the basis that the District Judge had not erred in law and the exercise of his discretion had not been plainly wrong, so Eleanor King J should not have interfered. But Sir Nicholas Wall P commented that (as Wilson LJ had observed when giving permission to appeal) had the District Judge dismissed the claim 'I doubt very much whether the appellant would have secured reversal of that dismissal on appeal' (para 59).
>
> (2) He might have decided to make an order which would have the dual benefits of giving the applicant what she most needed and saving the public purse the most money. That is in effect what the Court of Appeal did, by ordering the estate to pay enough money to enable her to buy the rented home which the housing association was willing to sell to her and a further lump sum to draw down as she saw fit. Housing is undoubtedly one of the first things that anyone needs for her maintenance, along with food and fuel. This was benefits-efficient from her point of view, because it preserved the family's claims to means-tested income benefits. It was benefits-efficient from the public's point of view, because it saved the substantial sums payable in housing benefit. She would lose the benefit of the landlord's repairing obligations but how valuable this would be is a matter of speculation. It is difficult to reconcile the grant of an absolute interest in real property with the concept of reasonable provision for maintenance: buying the house and settling it upon her for life with reversion to the estate would be more compatible with that. But the court envisaged her being able to

General comments made in the Ilott *case*

63 Of importance from our perspective is the concurring judgment of Baroness Hale in *Ilott v Blue Cross*, with whom Lord Kerr and Lord Wilson expressly agreed.

64 Baroness Hale reviewed research into attitudes in England and Wales towards testamentary freedom.[47] Baroness Hale commented:

> "57. It will therefore be seen that, unsurprisingly, there is a variety of reasons why people believe that descendants should be entitled to a share of the deceased's estate. The bloodline or lineage is undoubtedly one of these, and seems to have featured strongly in both studies. Another is need, whether stemming from disability or poverty, although others felt strongly that descendants should be treated equally irrespective of need. And a third is desert, having earned a share by caring for the deceased or contributing directly or indirectly to the acquisition of his wealth.
>
> 58. *The point of mentioning all this is to demonstrate the wide range of public opinion about the circumstances in which adult descendants ought or ought not to be able to make a claim on an estate which would otherwise go elsewhere. That range of opinion may very well be shared by members of the judiciary who have to decide these claims. The problem with the present law is that it gives us virtually no help in deciding how to evaluate these or balance them with other claims on the estate.*

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use the capital to provide herself with an income to meet her living costs in future.

(3) He might have done what in fact he did for the reasons he did. He reasoned that an income of £4,000 per year would provide her with her 'share' of the household's tax credit entitlement and capitalised this in a rough and ready way, taking into account some future limited earning potential, at £50,000. He did not expressly consider, and was not presented with the information to enable him to consider, the effect that this would have on the family's benefit entitlements, and in particular the fact that they would lose their entitlement to housing benefit until their capital was reduced below £16,000."

[47] Morrell, Barnard and Legard, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families* (NatCen, 2009); and Humphrey, Mills and Morrell of the National Centre and Douglas and Woodward of Cardiff University, *Inheritance and the Family: Attitudes to Will-Making and Intestacy* (NatCen, 2010).

> Nor does the Law Commission Report which led to the 1975 Act. That Report recommended that any child or child of the family of the deceased should be able to apply, irrespective of age, sex or marital status, thus removing the restrictions imposed by the 1938 Act (para 79). The argument against doing that was that 'it might encourage able-bodied sons capable of supporting themselves to apply for provision from the estate, thereby possibly incurring costs to be paid from the estate and reducing the share of the surviving spouse or other beneficiaries'; but the Commission argued that such sons (or even daughters!) could not succeed unless the deceased had failed to make reasonable provision for them (para 74)." [Emphasis added]

65 Essentially, the creation of a judicial power equivalent to that under the Inheritance Act 1975 means that everything depends on the individual approaches of the judges. There is no clear legal principle by which the courts can "correct" a judge whose philosophy in these matters is libertarian or paternalist, for both approaches can find a place on the spectrum of reasonable outcomes. This does have the advantage of ensuring that Jersey judges—insofar as first instance decisions will largely be taken by the Bailiff and Deputy Bailiff—are taken by Jersey lawyers who have grown up as part of Jersey society. However, whether the small pool of first-instance Jersey judges leads to consistency of approach or swings between different ends of the reasonable spectrum depending on who takes the case, and will be a matter of chance at any particular time.

66 As a result, it can be said that the Inheritance Act 1975 system creates an inherent uncertainty for testators. Brian Sloan of Cambridge University, following the Court of Appeal decision, believed that that decision was not unusual when compared with earlier cases. He also stressed that anyone who "disinherited" a child created litigation risks by doing so[48]—

> "It must also be borne in mind that, throughout the life of the 1975 Act, it has been a calculated risk to 'disinherit' children who might need maintenance in the future (*c.f.* spouses and civil partners, whose valid claims are not limited to maintenance: 1975 Act, s. 1(2)(a)–(aa)), and that the deceased's views and intentions have always been somewhat relevant to but obviously not conclusive of, the appropriate level of provision (see *e.g.* R. Kerridge, *Parry and Kerridge: The Law of Succession*, 12th ed.

[48] Sloan, "The 'Disinherited' Daughter", *op cit*, at 33.

> (London 2009), para. [8–31]). Ilott confirms those contentions but it is by no means the most dramatic case in which provision has been made for an adult child. In *Re Land (deceased)* [2006] EWHC 2069 (Ch), for example, an adult son successfully claimed provision from his mother's estate notwithstanding his conviction for her gross negligent manslaughter and the resulting application of the forfeiture rule (Forfeiture Act 1982, s. 1) to his share under her will. Moreover, neither disapproval of lifestyle (*Espinosa v Bourke* [1999] 1 F.L.R. 747 (CA)) nor estrangement (*Gold v Curtis* [2005] W.T.L.R. 673 (Ch)) has inevitably prevented claims in previous cases."

67 For these reasons, it is understandable that Baroness Hale ended her concurring judgment in *Ilott* with these words—

> "I have written this judgment only to demonstrate what, in my view, is the unsatisfactory state of the present law, giving as it does no guidance as to the factors to be taken into account in deciding whether an adult child is deserving or undeserving of reasonable maintenance. I regret that the Law Commission did not reconsider the fundamental principles underlying such claims when last they dealt with this topic in 2011."

It thus appears that not only is the existing English law considered unsatisfactory by the courts but that it is liable to be reformed.

(ii) *Northern Ireland*

68 As noted above in para 57, a direct equivalent to the English Inheritance Act 1975 applies in Northern Ireland.

(iii) *Scotland*

69 The Scottish Government Consultation gives a clear description of the present Scottish law on protection against disinheritance, which it calls "legitim"[49]—

> "Under the current system a spouse/civil partner has legal rights and is able to claim a third of the deceased's moveable estate (cash, shares etc.) if the deceased is also survived by issue. If there are no issue, that claim is to a half of the moveable estate. Similarly, issue too have legal rights and are able to collectively claim a third of the deceased's moveable estate if there is also a surviving spouse/civil partner. Where there is no surviving

[49] *Scottish Government Succession Consultation, op cit*, at para 3.4.

> spouse or civil partner, they can claim half of the moveable estate. These legal rights apply to intestate estates once any prior rights have been satisfied."

70 Scottish "legitim" is strikingly similar to the Jersey system of *légitime*. The shares are the same where there is both a widow/widower and issue (*i.e.* one third to the surviving spouse/civil partner, and one third between the children) but if there is only one such category their share increases to a half, not to two thirds as in Jersey.

71 A key issue for the Scottish government related to the avoidance of *légitime* rather than the theory of the legislation[50]—

> "The current system of legal rights was described by the Commission as flawed. The key issue is that the nature of the deceased's property determines whether or not there is estate available against which a claim can be met. As legal rights are claimed on the moveable estate, an individual may be able to convert the bulk of their estate into heritable property and so prevent, or at least limit, claims by spouses/civil partners and children."

72 This is similarly an issue as regards *légitime* in Jersey. As stated above, it is possible for a testator to disinherit children by converting movable property into land. This may involve cost and inconvenience such as to deter testators who prefer the convenience of liquid assets in their lifetime, or distrust land as an investment.

73 There is also the further point that, if a person should be protected against disinheritance, it is counterintuitive for the law to exclude from the relevant property what is usually the largest part of a testator's assets, *i.e.* the home. A parent who has £100,000 in liquid assets and a house worth £2m is free to leave the house to a charity but the law intervenes as regards the £100,000.

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[50] *Ibid*, at para 3.5.

Scottish Law Commission main options

74 The Scottish Law Commission set out two main options for reform of "legitim". Both involved a "fixed rule" system but made considerable differences as to which children could benefit.

75 Option 1: This option reduced entitlements of children to 25% of what they would have received on intestacy. Where there was a surviving spouse/civil partner, this would be a potentially severe restriction, as the first £300,000 of the estate under the Law Commission's intestacy proposals would go to that survivor. However, the property concerned would no longer just be movable property such as cash and shares, but land as well.[51]

76 Option 2: This option gives the rights solely to dependent children. The Scottish Government Consultation described the proposal thus[52]—

> "[T]he rights of adult children would be abolished and dependent children given the right to a capital sum payment, calculated on the basis of what would be required to maintain the child until no longer dependent (until age 18 or 25 if in education or training). In this context dependent children are those who were owed a duty of aliment by the person who has died, immediately before their death. This would include children accepted as children of the family and children owed an equivalent obligation of aliment under foreign law."

It should be noted that Option 2 is not really about the broad claims to inherit but the quantification of specific claims for support. It is akin to compensation for a child who loses a parent and claims for loss of financial support under fatal accidents legislation.

Options in respect of definition of children

77 It should be noted that the Scottish Law Commission's Option 2 follows England and Wales in opening out the concept of children to include children of the family. Hence, it would include unadopted step-children where the step-parent has been *in loco parentis* for much of their childhood.

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[51] *Scottish Law Commission Report 2009, op cit*, at paras 3.36–3.64.
[52] *Scottish Government Succession Consultation, op cit*, at para 3.17.

Rapport à la masse

78 Paragraph 42 above set out the theoretical basis of *rapport à la masse* that had been criticised by the Scottish courts over a century ago when dealing with their equivalent known as collation.

79 The Scottish Law Commission agreed that there was no reason to view a testator's property in his or her lifetime as a fund due to the children, and that gifts by the testator are gifts out of that fund which need to be returned to properly calculate entitlements. The result was a recommendation by the Scottish Law Commission to abolish its current equivalent of *rapport à la masse*, and a suggestion that any replacement (and they favoured none) should be a simpler concept whereby any person wishing to claim their legal share of the testator's property had to return gifts in their lifetime[53]—

> "[W]e favour abolition of collation without replacement but if a 'collation type' scheme were to be introduced it should be simpler and apply only to legal share claims by children against a testate estate. Each claimant would have to deduct any lifetime gifts from his or her legal share and so be entitled from the estate to only the balance."

80 It should be noted that s 10 of the Inheritance Act 1975 allows the court to set aside dispositions of property made up to six years before the testator's death, if such dispositions were made "with the intention of defeating an application for financial provision". This perhaps shows that it is not as simple as saying that one regime (*e.g.* England and Wales) favours freedom over property, whilst another (*e.g.* Scotland) favours the rights of children. Were the Law Commission's proposals—even the simple "collation type" approach recommended—then the English regime will be more restrictive of the rights of testators, whereas the Scottish regime would be open to be defeated through deathbed gifts.

(iv) *New Zealand*

81 New Zealand has a well-established system of court-based discretion. The first legislation was the Testator's Family Maintenance Acts of 1900 and 1906. The latter was replaced by the Family Protection Act 1908. The present law for our purposes is the Family Protection Act 1955 which allows certain relatives to claim on an estate if the deceased has breached moral duties to the claimant and the court decides that further provision is needed for the applicant's proper

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[53] *Scottish Law Commission Report 2009, op cit*, at para 3.53.

maintenance and support. The Act applies both where the deceased left a will and on intestacy, and awards are made at the discretion of the presiding judge.[54]

82 Advocate Keith Dixon cited a *Harvard Law Review* article from the 1950s to the effect that the New Zealand system had been successful.[55]

83 However, it is clear that time has led to familiar criticisms resurfacing—although, as will be seen, they did not lead to a shift to a fixed-rules system[56]—

> "There is uncertainty and lack of consensus about the priorities of competing claims. There can be competing claims on an estate by a surviving partner, children of different relationships, a person to whom a promise was made, and creditors. The rules on balancing these claims, particularly where the estate is small, are not clear.
>
> - The courts struggle with nebulous expressions such as 'moral duty', 'wise and just testator', 'maintenance and support', and 'serious injustice', and the consequence is inconsistent and unpredictable decisions. This was acknowledged by the Court of Appeal in *Williams v Aucutt* where Blanchard J stated that there was substance in criticisms of the way in which the courts have applied the present law.
> - *Litigation costs rather than merit are forcing settlement of claims against estates.* There has long been an assumption that costs will be paid from the estate, and this is certainly true of the administrator's costs of providing information to the court and the parties. This problem is not unique to New Zealand." [Emphasis added.]

84 Such problems are interlinked. Court-based discretion regimes inherently appeal to qualitative criteria, which are summed up by appeals to concepts such as "moral duty" (as in the New Zealand legislation) or "reasonable provision" as in the English Inheritance Act 1975. This in turn creates difficulties of definition as regards the courts. The uncertainty of outcome may encourage litigation. These

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[54] The description is taken Kelly, "An Inheritance Code for New Zealand", *op cit*, at 2.

[55] Dixon, "*Légitime*", *op cit*, at 262 (fn 40), citing Laufer, "Flexible Restraints on Testamentary Freedom: A Report on Decedents' Family Maintenance Legislation" (1955) 69 *Harvard Law Review* 277, at 312.

[56] Kelly, "An Inheritance Code for New Zealand", *op cit*, at 5–6.

problems are both simultaneously difficulties with the system, and functions of the merit of flexibility that will be eroded if the breadth of discretion is replaced by tighter, quantitative rules.

85 As stated in para 15, the question is where to strike the balance between competing concerns.

New Zealand Law Commission Discussion Paper

86 In 1996, the New Zealand Law Commission presented a discussion paper with four options. Ultimately it would recommend continuation of the court-based discretionary system but as the object here is to identify options, it is useful to briefly outline these[57]—

> "*Option 1: Claims to relieve demonstrable financial need*
>
> Adult children could claim awards to relieve their demonstrable financial need.
>
> 233 Under this option the general idea is that it is not appropriate to make provision for adult children solely to foster equal sharing, or to ensure that those who merit recognition should be given it. Still less is the object to appease the strong feelings that children are likely to feel at being left out of a parent's will. Rather it is to meet financial need.
>
> Example 12*:*
>
> The will-maker dies, at age 80, leaving 2 children, A and B. Her estate is worth $250 000. She leaves it all to her local church. A and her husband are retired, with their own unmortgaged house, motor car and $20 000 in the bank. B is still working but is approaching retiring age. He lives in rented accommodation, and has no substantial savings.
>
> Neither A nor B is affluent but A is reasonably placed while B is not. This suggests that B should be awarded a substantial share of the estate, whereas A should either get nothing, or a much smaller amount."

87 It appears from the worked example that the New Zealand Law Commission would apply the principles in a way similar to that of the Court of Appeal in *Ilott v Blue Cross*,[58] making generous provision to an adult child who is not doing well and has no prospect of doing better.

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[57] *NZ Law Commission Discussion Paper, op cit*, at para 233 *et seq.*
[58] [2015] EWCA Civ 797.

88 Option 2 proceeds on the basis that children do have a right to an inheritance, although one that can be denied on reasonable grounds—

> "*Option 2: Claims to prevent 'capricious or vindictive', mistaken or accidental disinheritance*
>
> Adult children could claim an award to prevent the will-maker from disinheriting a child in a way that is:
>
> - manifestly capricious or vindictive;
> - vitiated by a serious mistake of fact about
>   - the size of the estate at the time the will-maker died,
>   - the size of the provision made for the child (if any) at the time the will-maker died, or
>   - the child's circumstances or conduct; or
> - manifestly inconsistent with the will-maker's wishes, by reason of
>   - the will-maker's failure to make a new will in circumstances which have substantially changed since the will-maker's last will, or
>   - the will-maker's unsuccessful attempt to make a new will.
>
> 241 This approach is better justified than one based on need. It acknowledges that, once obligations to first-tier testamentary claimants have been met, it is for the will-maker to decide who benefits under his or her will, and in what proportions those people benefit. Excluding children is justified only when the will-maker has, at the time of their death, some reasonable ground for doing so. Even so, the courts should not interfere unless a claimant can cross a high threshold test of unreasonableness, or show that the will departs substantially from the will-maker's own intentions.
>
> . . .
>
> 243 It might be argued that all these restrictions are an undue fetter on will-makers' uncontrolled power of ownership of this part of their estates. But the mere fact of ownership does not reasonably carry with it an absolute power to dispose of property on death by will."

89 The third option similarly presupposes a measure of entitlement on children but focuses on the reasonableness of the choice to leave the money elsewhere (emphasis added)—

> "*Option 3: Criteria of reasonableness*

251 This option requires that an adult child show that the will-maker was moved to disinherit the adult child for insupportable reasons, or for no valid reason at all. This assumes that there are some reasons for making a will which are valid, and other reasons which are invalid. One or other set of reasons needs to be spelt out in the statute. On the whole it is easier to spell out reasons which are sound. If it is established that the will-maker was motivated by one of the reasons stated below, then the will would stand.

A will-maker may reasonably decline to make provision for an adult child on the grounds of:

- Higher obligations to others which must be met instead of providing for the child.
- Will-maker's dissociation from, or lack of responsibility for, the child.
- Established practices or understandings within the family which preclude provision being made for the child.
- Provision made by or for others in place of the will-maker providing for the child, or provision already made for the child other than by will.

252 Each good reason for declining to make provision could, in a statutory provision, be stated in more detail . . ."

90 The fourth option was simply to have no system of intervention—

"*Option 4: No power to intervene*

Under this option no adult children could claim an award.

263 This option has the advantage of clarity. It is also a recognition that the grounds on which adult children might claim provision from will-makers' estates do not lend themselves to clear and consistent definition, so that the problem of "unfairness" may be more apparent than real. It can be supported on the grounds that it is generally undesirable to maintain legal rules which are uncertain, which have no defined purpose, and which operate unpredictably. This option is also supported by efficiency considerations. It does not invite lengthy and expensive litigation by providing a law with no clear purpose. This option is based on the conviction that no distribution substituted for a will-maker's achieves so much more fairness or promotes social good to such an extent that it justifies the accompanying expense, delay and divisive interference with family life.

> 264 This option has the advantage of permitting conscientious will-makers to make provision which accommodates and responds to their varied family circumstances better than any law can. It also recognises that the scale of the problem of wills which adult children perceive as unfair does not justify the extensive powers granted to counter them. Powers as extensive and indeterminate as those in the present law, if they applied to the living, would be intolerable. This option also permits a justifiably greater emphasis to be given to clearer and stronger first-tier claims.
>
> 265 Yet this option also permits will-makers who are capable of making a will to exclude their children from their estates, perhaps for reasons that others may disagree with, or perhaps for no discernible reason at all. The Commission is aware that the abolition of adult children's claims would be regretted by lawyers practising in this area who consider that the law produces useful results which they can anticipate. It would also be regretted by a broad range of legal practitioners who see in such claims the virtue that they deal with wills which they consider capricious and vindictive."

91 The New Zealand Law Commission's own conclusion at para 268 of its Discussion Paper was that it preferred not to state a view. However, it ultimately recommended restricting intervention in respect of adult children.

92 The upshot of the consultation is that Family Protection Act 1955 remains in force unamended. However, it is not quite as simple as that. The history is summarised by a Consultation Paper from the Law Commission from England and Wales[59]—

> "[A] report from the New Zealand Law Commission in 1997 recommended 'radical change', dramatically limiting the courts' discretion to grant family provision awards to adult children. The Succession Adjustment Bill published with that report contains provisions that would limit provision to what is truly needed for 'support', in the sense of ongoing necessities rather than of generous capital provision. *Even though that Bill has not been enacted*, the courts have followed the New Zealand Law

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[59] The Law Commission, "Consultation Paper 191: Intestacy and Family Provision Claims on Death", 2009, at para 5.17, citing Peart and Borkowski, "Provision for Adult Children on Death—The Lesson from New Zealand" [2000] *Child and Family Law Quarterly* 333, at 343.

> Commission's lead, moving away from 'estate engineering'. Claims by adult children are now far less likely to succeed, and if successful now result in less generous provision. Peart and Borkowski conclude:
>
> > 'It seems that the judge or legislator from [a common law tradition] will inevitably shrink from anything which approaches an automatic sharing of parents' estates, despite such an approach being taken for granted in the civil law systems . . .'" [Emphasis added.]

As a court-based discretionary system is by its nature imprecise as to what decision must be used and the weight to be given to particular factors, so its meaning comes from the prevailing social philosophy amongst the judiciary. So trends in thought amongst the legal profession may lead to changes in such a law's application even when they do not lead to the legislature accepting amendments.

Avoidance of Family Protection Act 1955

93 It is worth noting a comment made in Gregory Kelly's 2010 paper on New Zealand inheritance law[60]—

> "Family trusts, transfers of assets to third parties and structures such as joint ownership have been used to defeat inheritance claims. Over the last 15–20 years there has been a massive increase in the number of family trusts set up in New Zealand, and one of the main drivers of this is asset or inheritance planning.
>
> Some aspects of our inheritance laws such as family protection and testamentary promises claims are handled primarily in the Family Court but others such as will interpretation and estate/trust administration are handled exclusively in the High Court. If a particular case raises a number of issues, this may require separate proceedings to be filed in the High Court and the Family Court. Traditionally, all estate and trust matters were handled exclusively in the High Court but there have been significant inroads on this over recent times. This has resulted in uncertainty, and it is time to undertake a fundamental review."

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[60] Kelly, "An Inheritance Code for New Zealand", *op cit*, at 7 (http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/1403/thesis.pdf?sequence=2 last accessed 19 April 2017).

94 The point is, as we saw with s 10 of the Inheritance Act 1975,[61] that the issues around gifts to future heirs or running down the estate to defeat claims will still apply if a court discretion-based approach is adopted.

(v) *New South Wales Reform Commission*

95 In 2004, the New South Wales Reform Commission published draft legislation on succession reform, with a commentary.[62] This ultimately became the Succession Amendment (Family Provision) Act 2008.[63]

96 The proposals created a two tiered structure for who could apply for relief—[64]

(a) Firstly, there were spouses, *de facto* partners and non-adult children of the deceased. They had a right to make the application.

(b) Secondly, other family members to whom the deceased "owed a responsibility to provide maintenance, education or advancement" could also apply. This could include siblings, although not always. It would include adult children.

97 The provisions on what may be ordered are very much based on need around the categories of "proper maintenance, education and advancement".[65] Hence, an obligation to maintain is unlikely to apply to a non-dependent adult but an obligation to fund education, may apply. "Advancement" is associated with "expenditure of capital (for example, the setting up of someone in business or upon marriage)".[66] There is thus, in the case of non-dependent children, a clear link between having to prove a type of obligation owed by the parent to the child, and the relief that would be given.

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[61] See para 80, above.

[62] New South Wales Reform Commission, *Report 110: Uniform Succession Laws: Family Provision*, 2005 (see http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-110.pdf, last accessed 20 April 2017).

[63] See http://www.lawreform.justice.nsw.gov.au/Documents/Completed-projects/2000-2009/Uniform-succession-laws/2008-75.pdf, last accessed 20 April 2017.

[64] New South Wales Reform Commission, *op cit*, at para 2.7–2.20.

[65] See s 59 of the Succession Amendment (Family Provision) Act 2008.

[66] New South Wales Reform Commission, *op cit*, at para 2.36.

(vi) *Guernsey*

98 By the Inheritance (Guernsey) Law 2011, Guernsey abolished its equivalent of *légitime* and moved to a system explicitly (and almost precisely) modelled on the Inheritance Act 1975. The Law came into effect on 2 April 2012.

99 As has been noted above, opinion as to reform has tended in other jurisdictions to be heavily influenced by the starting point of the relevant legal system. Scotland is considering changes within a fixed-rule system; but New South Wales's Reform Commission reformed within a court-based discretionary system. In the case of Guernsey, the move was a radical change from fixed legal entitlements to discretionary relief.

100 The former Bailiff of Guernsey described the process of change as follows[67]—

> "34 At its meeting on 27 January 2010, the States approved proposals from the Inheritance Law Review Committee to enact legislation—
>
> - to replace the current system of what the Committee described as forced heirship in Guernsey by testamentary freedom accompanied by family provision;
> - under testamentary freedom, an individual will be able to leave, by will, the whole of his or her immoveable (real) and moveable (personal) property to such person or persons, and in such proportions, as he or she chooses;
> - family provision will be similar to that which applies in England and Wales (under the Inheritance (Provision for Family and Dependants) Act, 1975);
>
> . . .
>
> 35 These proposals met with less consideration and debate in the States of Deliberation than the reforms of the nineteenth and twentieth centuries received in their time. Apart from vocal opposition from a few doughty advocates who still had some respect for the Norman tradition, the *Projet de Loi* implementing these proposals was nodded through with little opposition or understanding of the real issues involved."

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[67] Sir de Vic Carey, "The Abandonment of the Grand Principles of Norman Custom in the Law of Succession of the Bailiwick of Guernsey" (2014) 18 *Jersey and Guernsey Law Review* 181.

101 In the "Response to Consultation on Trusts (Jersey) Law 1984—Relating to *Légitime*", Law Firm E submitted an appendix stating that no cases had been heard up to that point in Guernsey.[68] A search of the Guernsey Legal Resources website shows that there are no judgments up 21 April 2017. A common inference from a prolonged absence of litigation around a statute is that it is working successfully. Although we might also note a comment from a 2010 New Zealand Research Paper on that country's court-based discretionary system,[69]"Litigation costs rather than merit are forcing settlement of claims against estates". Such issues are difficult to research, save by asking the lawyers involved. However, where the law is of uncertain outcome, legal costs inevitably increase. Those who would want to avoid the strictures of *légitime* are doubtless the ones most likely to be anxious to avoid any risk of successful challenge to their will.

(vii) *Alderney*

102 The Inheritance (Alderney) Law 2015 has created the same change as seen in Guernsey.

(viii) *Ireland*

103 The position in Ireland is governed by the Succession Act 1965. The relevant provision are s 111 and s 117—

> "111.—(1) If the testator leaves a spouse and no children, the spouse shall have a right to one-half of the estate.
>
> (2) If the testator leaves a spouse and children, the spouse shall have a right to one-third of the estate."
>
> "117.—(1) Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just . . .
>
> (2) The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a

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[68] *Trust Law Working Group Consultation*, *op cit*.

[69] Kelly, "An Inheritance Code for New Zealand", *op cit*, at 5–6. See para 83 above.

decision that will be as fair as possible to the child to whom the application relates and to the other children."

104 The Irish Law Reform Commission said this of the provision in 2004[70]—

"If a testator dies without making proper provision for the children, the latter may apply to the court to have such provision made for them out of the estate. In contrast to the legal right share of a surviving spouse, a surviving child is not entitled to a fixed share of the estate, the size of the award, if any, is at the discretion of the court. The test is whether the testator failed in his or her 'moral duty' to make proper provision for the applicant and in considering this, the court will assume the role of 'a just and prudent parent'. Where it is established that the applicant failed in his or her 'moral duty', the court in determining the size of the award will take into account the position in life of each of the testator's children and any other relevant circumstances, such as prior provision or particular need."

105 The principles *Re: ABC Deceased XC v RT*[71]—

"(a) The social policy underlying s. 117 is primarily directed to protecting those children who are still of an age and situation in life where they might reasonably expect support from their parents, against the failure of parents who are unmindful of their duties in that area.

(b) What has to be determined is whether the testator, at the time of his death, owes any moral obligation to the children and if so, whether he has failed in that obligation.

(c) There is a high onus of proof placed on an applicant for relief under s. 117, which requires the establishment of a positive failure in moral duty.

(d) Before a court can interfere, there must be clear circumstances and a positive failure in moral duty must be established.

(e) The duty created by s. 117 is not absolute.

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[70] Irish Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitees (LRC CP 32-2004)*, para 4.05 (see http://www.bailii.org /ie/other/IELRC/2004/cp32.html, last accessed 20 April 2017).
[71] [2003] 2 IR 250.

(f) The relationship of parent and child does not, itself and without regard to other circumstances, create a moral duty to leave anything by will to the child.

(g) Section 117 does not create an obligation to leave something to each child.

(h) The provision of an expensive education for a child may discharge the moral duty as may other gifts or settlements made during the lifetime of the testator.

(i) Financing a good education so as to give a child the best start in life possible and providing money, which, if properly managed, should afford a degree of financial security for the rest of one's life, does amount to making 'proper provision'.[72]

(j) The duty under s. 117 is not to make adequate provision but to provide proper provision in accordance with the testator's means.

(k) A just parent must take into account not just his moral obligations to his children and to his wife but all his moral obligations, *e.g.* to aged and infirm parents.

(l) In dealing with a s. 117 application, the position of an applicant child is not to be taken in isolation. The court's duty is to consider the entirety of the testator's affairs and to decide upon the application in the overall context. In other words, while the moral claim of a child may require a testator to make a particular provision for him, the moral claims of others may require such provision to be reduced or omitted altogether.

(m) Special circumstances giving rise to a moral duty may arise if a child is induced to believe that by, for example, working on a farm, he will ultimately become the owner of it, thereby causing him to shape his upbringing, training and life accordingly.[73]

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[72] This contrasts with the position in respect of *légitime*, where costs of education are not taken into account as being part of ordinary parental costs, *supra*, para 41(a).

[73] In Jersey, such arrangements may amount to a contract, see *Gallichan v Gallichan* 1954 JJ 57, or give rise to enforceable estoppel, *Pirouet v Pirouet* 1985–86 JLR 151.

(n) Another example of special circumstances might be a child who had a long illness or an exceptional talent which it would be morally wrong not to foster.

(o) Special needs would also include physical or mental disability.

(p) Although the court has very wide powers both as to when to make provision for an applicant child and as to the nature of such provision, such powers must not be construed as giving the court a power to make a new will for the testator.

(q) The test to be applied is not which of the alternative courses open to the testator the court itself would have adopted if confronted with the same situation but, rather, whether the decision of the testator to opt for the course he did, of itself and without more, constituted a breach of moral duty to the plaintiff.

(r) The court must not disregard the fact that parents must be presumed to know their children better than anyone else."

106 It is thus possible for a testator to take the "Gordon Ramsay" approach to inheritance, *i.e.* that having provided a good education and a deposit on a house, that was all his children should need by way of material help. If we recall the New South Wales concept of parental duty to provide "advancement" (see, above, paras 96–97), the Irish principles recognise that such a duty can be discharge definitively in life.

107 It is also worth noting that the means of a testator are often a crucial factor. For example, in the case of *SB v Bank of Ireland*, a gift of £100,000 to a child was increased to £250,000 by reason of the size of the estate rather than need.

(ix) *Provision in European Union states*

108 It is of great interest to set out the protection from disinheritance provisions of all the other European Union jurisdictions (*i.e.* those other than the British jurisdictions and Ireland, which have already been considered). These are near neighbours—particularly given that Jersey shares at least as much of a common legal heritage with the European continent than it does with the United Kingdom.

109 There is not the space to set out a detailed study but a summary of the various systems will be sufficient. The text in the right hand box should be taken to be a direct translation from the source given, with the exception of Germany and Poland.[74]

Country	*Fixed rule provision*
Austria	The compulsory portion (which restricts the degree of testamentary freedom) amounts to half the legal portion due for the deceased's issue and, if there is no issue, to one third of the legal portion due for relatives in the ascending line. The compulsory portion for surviving spouses or registered partners is half their legal share. If a compulsory heir never had a close family relationship with the deceased, the compulsory portion may be reduced.
Belgium	(a) In the case of children (or descendants), the reserved portion is half the estate where there is one child, two thirds where there are two children and three quarters where there are three children or more. (b)Where there are no descendants, the father and mother are each entitled to one quarter of the estate. In that case, however, the entire estate may be left to the surviving spouse. (c) The surviving spouse always receives at least either usufruct (the right to enjoy the use and benefits) of half the assets comprising the estate or usufruct of the property used as the main residence and its furniture, even if that exceeds half the estate.
Bulgaria	The surviving spouse and children of the deceased or, in the absence of descendants, the parents of the deceased are

[74] See European Justice, *Succession* (https://e-justice.europa.eu/content_succession-166-at-en.do?member=1, last accessed 3 April 2018). The page provides a menu to access all member state details.

entitled to a reserved share. If the testator has descendants, surviving parents or a spouse, the testator may not make a disposition or gift of property adversely affecting their reserved share. The sum total of the reserved shares of all beneficiaries may account for up to five-sixths of the property if the deceased leaves behind a spouse and two or more children. The property other than the reserved share represents the testator's disposable share.

If there is no surviving spouse, the descendants (including adoptees) have the following reserved shares: in the case of one child or that child's descendants: one half; in the case of two or more children or their descendants: two thirds of the testator's property.

If there are descendants and a surviving spouse, the reserved share of the spouse is equal to the reserved share of each child. In this case the disposable share amounts to one third of the property in the case of one child, one quarter in the case of two children and one sixth of the property in the case of three or more children.

If the testator leaves no descendants, the reserved share of the spouse is one half if the spouse is the only heir or one third if there are surviving parents of the deceased.

The reserved share of the surviving parent or parents is one third.

Croatia — The testator's freedom to dispose of property is restricted by the right of forced heirs to a reserved share.

Forced heirs are—

(a) the testator's descendants, adopted children, children in the care of the testator as a partner and their descendants, the testator's spouse or extramarital partner, the testator's life partner or informal life partner—they are entitled to a reserved share amounting to one half of the portion that would have gone to them in the legal order of succession had there been no will;

(b) the testator's parents, adopters and other ancestors—they are entitled to a reserved share only if they are permanently incapacitated to work and indigent, and their reserved share amounts to one third of the portion that would have gone to them in the legal order of succession had there been no will.

Cyprus — Children have the right to share up to 25% of the net value

of the estate. If there is no child but a surviving spouse or parent (father or mother), they have the right to share up to 50%, whereas in all other cases, the entire inheritance may be devolved.

Czech Republic

Reserved share—general information

The mandatory heirs of a testator are his relatives in descending order. A mandatory heir who (i) has not waived a right of succession or a right to a reserved share; (ii) is an eligible heir; and (iii) has not been effectively disinherited is entitled to a reserved share or to the supplementation thereof if he or she is wholly or partly omitted by the testator in the disposition of property upon death, *ie* he or she does not receive, in the form of a share in succession or a legacy, estate which, by value, is equal to his or her reserved share. The surviving spouse and any relatives in the ascending order are not mandatory heirs. Minor relatives in the descending order must receive at least the equivalent of three quarters of their statutory share of succession; adult relatives in the descending order must receive at least one quarter of their statutory share of succession. If the will contradicts this and if the testator has not disinherited a mandatory heir for reasons defined by law, a mandatory heir is entitled to payment of a sum of money equal to the value of his or her reserved share. If the testator is widowed and has two children, the share of succession of each of them is one half. If one of them is a minor, his or her reserved share comprises three eighths; for an adult relative in the descending order, the reserved share is one eighth.

Special cases

If a mandatory heir is (consciously) omitted from a will without being disinherited but has engaged in acts fulfilling any of the statutory reasons for disinheritance, such an omission is treated as disinheritance effected tacitly and rightfully, and in this situation the relative in the descending order has no right to a reserved share.

If a mandatory heir is omitted from a will solely because the testator, in the disposition of property upon death, did not know about him or her (*eg* the testator was under the impression that this relative in the descending order had died, or had no awareness of the fact that a particular person was the testator's relative in the descending order), that mandatory heir is entitled to the reserved share to which he or she has a right by law.

Denmark	There is forced heirship for the surviving spouse and the heirs in class 1. The forced share is one quarter of the intestate share. By will the forced share of children can be reduced to 1 million DKK (approximately 135,000 EUR); a predeceased child's 1 million DKK forced share is divided equally between his children. Lifetime gifts are not taken into account when calculating the forced share unless the gift was made as an advancement (*arveforskud*). The presumption is that lifetime gifts are not intended to be an advancement.[75]
Estonia	Freedom of testation is restricted by the institution of reserved share which restricts the testator's freedom to leave his or her property to the heirs of his or her liking . . . The amount of the reserved share is half of the value of the share of the estate that an heir would have received in the event of a succession under law, had all of the legal heirs accepted the estate.[76]
Finland	(a) Direct descendants and adopted children, as well as their own descendants, are entitled to a legal share of the deceased person's estate. The legal share amounts to half the value of the share of the estate devolving to that heir in accordance with the statutory order of succession. (b) A spouse also enjoys protection from a will made by the first deceased spouse. The surviving spouse may keep the deceased spouse's undivided estate, subject either to an application by a direct descendant for distribution of the estate or to a will made by the testator. The surviving spouse may always, however, retain undivided possession of the spouses' common home, as well as the usual household effects, unless the surviving spouse owns residential property that is suitable as a home.
France	Reserved portion for children: half if the deceased leaves only one child on death, two thirds if he leaves two children and three quarters if he leaves three children or more Reserved portion for a surviving spouse: the reserved

[75] TH Dahl, A Castenschiold Paaske, *Denmark: International Estate Planning Guide Individual Tax and Private Client Committee*, September 2012, at 4. Note that the testator can limit the child's entitlement to €135,000.
[76] Essentially, the entitlement is a proportion of the entitlement on intestacy.

	portion for a surviving spouse is one quarter of the assets in the estate.
Germany	Half of the share that the spouse and children would have received on intestacy.
Greece	A. The descendants and parents of the deceased, as well as the surviving spouse or a survivor with whom the deceased had concluded a registered partnership, who would have been called as intestate successors, are entitled to a reserved portion of the estate. (Article 1825 of the Civil Code and art 11 of Law 3719/2008.) B. The reserved portion of the estate corresponds to half of the intestate portion. The legal beneficiary of that portion is included as an heir apparent in relation to that portion. (Article 1825 of the Civil Code.) C. The method used to calculate that ratio is complex. Account is taken of the chargeable benefits already received by the beneficiary from the deceased and of the total (notional) value of the estate. (Articles 1830–1834 of the Civil Code.)
Hungary	Pursuant to s 7:10 of the Civil Code, testators are entitled to freely dispose of their property, or a part thereof, by a disposition of property upon death. Accordingly, the freedom of testamentary disposition extends to all the assets of the testator. Even though Hungarian law contains the statutory arrangement of reserved share accruing to certain close relatives (descendant, spouse, parent) of the testator, the reserved share under Hungarian law is a claim subject to *contract law*, which the beneficiary may enforce *vis-à-vis* the heirs. (The period of limitation for this claim is five years.) The person entitled to a reserved share does not become an heir, that is, he is not entitled to any material (*in rem)* share in the estate even if he is successful in enforcing his claim against the heir.
Italy	Italian law has a complex system of reserved quotas. • Where there is one child and a spouse, both must receive one third. • Where there is two children or more and a spouse, the children share one half, the spouse takes one quarter. • If there is only one child and no spouse, he or she must receive one half.

	• If there are two children or more, and no spouse, they share two thirds. There are also rules on ascendants.[77]
Latvia	A testator may freely determine the disposition of their whole estate in the event of their death, with the restriction that those persons entitled to a reserved share are bequeathed the said reserved share. Persons entitled to a reserved share have only the right of claim to the transfer of the reserved share in monetary form.[78]
Lithuania	Yes, the Civil Code provides for the right to the reserved share: the deceased's children (adopted children), spouse and parents (adoptive parents) *who were financially dependent on the deceased on the day of his or her death* inherit, irrespective of the content of the will, half of the share that each of them would have been entitled to by intestate succession (the reserved share) unless more is bequeathed in the will. The reserved share is determined on the basis of the value of the estate, including ordinary household furnishings and equipment.[79]
Luxembourg	In Luxembourg law, only the descendants of the deceased (children, or their children if they have already predeceased him at the time of his death) are entitled to the reserved portion. The reserved portion is half the legal assets of the estate if the deceased leaves one child, two thirds if he leaves two children and three quarters if he leaves three children or more.
Malta	The Civil Code refers to the reserved portion. This is a right of credit on the estate of the deceased set aside by law for the descendants of the deceased by the surviving wife or husband. In accordance with s 616 of the said Code, the reserved portion set aside for all of the children—whether

[77] See http://www.italianinheritance.it/testamentary-succession/, last accessed 3 April 2018).
[78] The information provided does not extend to actual amounts or proportions.
[79] The underlined proportion emphasises the restriction on inheritance rights. As with the Scottish Law Commission's "Option two", dependency is a necessary requirement.

	conceived or born in wedlock, conceived or born out of wedlock, or adopted—amounts to one third of the value of the estate where there are no more than four children, and half of the value of the estate where there are five children or more.
Netherlands	Only the descendants of the deceased (children or—if the children have predeceased—their children) are entitled to a reserved share. Neither the spouse nor the ascendants are entitled to a reserved share. The reserved share amounts to half of the estate.
Poland	Polish law provides provision for reserved shares, to protect the interests of spouses and close relatives. It is unclear what this is.
Portugal	The reserved share of the spouse and children is two thirds of the inheritance.
Romania	The reserved portion of the succession is the part of the inheritance to which forced heirs (surviving spouse, descendants, and privileged ascendants—parent of the deceased) are entitled, even against the wish of the deceased. The reserved portion for each forced heir shall be half of the share which would have been due to them as a legal heir, in the absence of any liberalities or disinheritance in the will.
Slovakia	Yes, s 479 of the Civil Code (Act No 40/1964) specifies the reserved portions of the estate and the heirs entitled to them—
	"Minor descendants must receive at least as much as constitutes their share of the estate under the law and descendants of age must receive at least as much as one half of their share under the law. Where a will contradicts the above, the relevant part of the will shall be void, unless the specified descendants have been disinherited".[80]
Slovenia	Necessary heirs are entitled to a portion of the estate that the testator is not permitted to dispose of. (Article 26(1) of the ZD.) This portion of an estate is the "necessary share". Necessary heirs are: the deceased person's descendants,

[80] Minor children receive their entire intestacy share, whilst older children receive half.

	his/her adopted children and their descendants, his/her parents and his/her spouse. The grandfathers, grandmothers, brothers and sisters are necessary heirs only when they are permanently incapable of work and have none of the means required for sustaining a livelihood. The persons listed above are necessary heirs if they are entitled to inherit under the statutory order of inheritance. (Article 25 of the ZD.)[81]
Spain	Spanish common law reserves a portion of the inheritance for certain relatives, in the form of a legitimate portion. According to the Civil Code, the "legitimate portion is the portion of the estate that the testator cannot distribute as this portion is reserved by law to certain heirs, referred to as 'legal heirs'". Legal heirs are: 1. Children and descendants, with respect to their parents and ascendants. 2. In the absence of the above, parents and ascendants, with respect to their children and descendants. 3. The widow or widower in the manner provided by law. The legitimate portion of children and descendants consists of two thirds of the estate of the father and mother. However, the latter may distribute one of the two thirds forming the legitimate portion in order to improve the inheritance of their children or descendants. The remaining third will be freely distributable. The local or special laws contain various rules laying down specific provisions relating to legitimate portions. Each of these rules must be examined to determine the specific aspects regulated in each of these territories, which range from the *pars bonorum* legitimate portion to *pars valorumo* involving a right to a share of the value of the property, which is paid in cash and is a simple credit right, as in Catalonia, and even a symbolic legitimate portion as in Navarre, which simply requires a ritual formula in the will of the testator required to pay.

[81] As with the New South Wales reforms, there are those who have entitlements by virtue of relationship alone, and those for whom entitlement is contingent on dependency. However, unlike New South Wales, once the necessary relationship/dependency is shown, entitlement follows automatically.

Sweden	• If the testator was married, the surviving spouse is entitled to receive property that, together with what the surviving spouse received at the division of their joint estate or that constitutes the spouse's separate property, corresponds to SEK 177 600. This right is valid as far as the estate is of a sufficient value. This means that if there is no property of such a value, the surviving spouse inherits all the property that exists. Wills that restrict this right will not be valid in this respect. • Children and grandchildren of the deceased (known as *bröstarvingar*, "heirs of the body") are entitled to a statutory minimum portion of the inheritance. The statutory portion (*laglott*) is half of the share that is due by law to the children and grandchildren where there is no will, to which the children and grandchildren have equal rights.

110 This comprehensive tour of European Union laws demonstrates that fixed-rule entitlements for children are common in civil law jurisdictions. In every European Union country from a civil law tradition, such rules are found. There are variations as to amount, and in the case of Denmark the amount of legal entitlement can be restricted to €135,000. Latvia restricts entitlement to dependants. However, in the vast majority of cases, adult children are entitled as of right to a percentage share of their parent's estate.

European Succession Regulation

111 The European Succession Regulation No 650/2012 has made certain changes relevant to protection against succession. The *Jersey Finance Report* described the effect of the EU Regulation as follows[82]—

> "With the origin of légitime being in French jurisprudence, it would be remiss not to note the impact of the European Succession Regulation No. 650/2012 (nicknamed Brussels IV) which has applied since 17 August 2015. Under Brussels IV, French forced heirship rules can now be avoided both by French nationals who are not habitually resident in France at the time of death and by non-French nationals who live in France (and who can apply the succession laws of their own jurisdiction).

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[82] *Jersey Finance Report, op. cit.*, at para 3.7.

> Brussels IV means that just one law applies to succession across all EU Member States (the Regulation Area) except Denmark, Ireland and the United Kingdom."

112 However, it is important to understand what the Regulation achieves, as the summary given by Jersey Finance Ltd does not capture the relevant essence. It elides the point that EU law does not just permit an individual to avoid local inheritance law—it creates a choice as between which of two relevant jurisdictions should apply to resolve questions of entitlement.

113 The relevant parts of the Regulation are as follows—

> "Article 21
>
> **General rule**
>
> 1. Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.
>
> 2. Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.
>
> Article 22
>
> **Choice of law**
>
> 1. A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.
>
> 2. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death."

114 The point is simply this, a person who moves between member states may opt for his estate to be governed by the substantive laws of succession of his country of nationality—or one of those countries, should he have more than one EU citizenship.

115 The first point to note is that all EU jurisdictions other than England and Wales, Northern Ireland and Gibraltar[83] have fixed-rule inheritance provisions. The Republic of Ireland's provision relates only to spouses, although it has a fairly generous (in comparison to England) court-based discretionary approach for children. However, it is only accurate to say that the European Regulation permits, for example, a German living in France to opt out of French laws on protection from disinheritance if we add that such a testator would bring himself immediately into the equivalent German provisions. Unless moving to Latvia, it may be very difficult to use the Regulation to avoid "forced heirship".[84]

116 The significance of the European Regulation, perhaps, is as a precedent for people who have moved to a jurisdiction opting out of that jurisdiction's substantive rules of inheritance, and instead being subject to the provisions of their home jurisdiction. This example may be of interest to Jersey—although obviously the effect of the European Regulation cannot easily be created unilaterally by a single jurisdiction.

Conclusion to Part 1

117 As explained at the beginning, this article will be in two parts. This first part has set out the background to the debates in Jersey. This has included a review of two basic approaches towards protection against disinheritance, that of a "fixed-rule system" and a "court-based discretion system". The perceived advantages and disadvantages of the two approaches, and their basis in local social attitudes, were set out. This was re-enforced by a comparative analysis which shows that a fixed-rule system, far from being an unmodern system, is the overwhelmingly dominant approach in continental Europe. There is no right or wrong answer, just different answers to complex issues seen through the lens of local thinking.

118 In Part 2, we shall move to the question of what particular issues need to be addressed in Jersey.

Dennis Dixon is a Legal Adviser at the Law Officers' Department, Jersey. The article is based on a review of the Law Officers' Department. Any amendments of that review are his opinion and should not be taken to represent the view of the Law Officers.

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[83] Gibraltar follows the Inheritance Act 1975 model: see the Inheritance (Provision for Family and Dependents) Act 1977.

[84] It could be used by Irish and Danish citizens, and British citizens for the next two years.