LÉGITIME REFORM: WHERE TO GO? (Part 2)

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This is the second instalment of this article considering the reform of légitime. It will follow the earlier comparative analysis by arguing that lessons should be learned from other systems. It is not a matter of choosing between the current English system or the current Jersey system. Given the lack of any clear, current evidence as to Jersey public opinion, it is important that legislators bear in mind all relevant factors and options. A system of allowing those of high net wealth to opt out of légitime would risk creating a system of total testamentary freedom which does not appear to exist anywhere else. A cap on claims should be considered. In particular, it will be argued that, if there is a desire to have a fixed rule system for protection against disinheritance, then it should be reformed so as to better meet the objectives. The distinction between movable and immovable property is difficult to justify in modern Jersey, where the bulk of the value in most estates will be in land.

Introduction

1 This is the second part of the article on *légitime*, the first having been published in the June 2018 issue of this *Review*.

2 In the first part, we set out the nature of *légitime* as a system for giving protection against disinheritance, and the areas of contention that exist around all such systems. It was explained that systems generally divide into two categories—

(a) fixed-rule systems; and

(b) court-based discretionary systems.

In the former, there are clear entitlements for certain relatives to inherit certain proportions of the assets, and in the latter the court has discretion to make awards in favour of particular classes of relatives and dependents.

3 The question of which of these two approaches to take is not simply a matter of preferring putative moral obligations to relatives and dependants over testamentary freedom, but as to how to strike a balance between the two. How far a society favours one goal over the other should not be seen as an attempt to reach an objective moral truth, as the issues involved are often matters of local culture, with citizens inclined to believe in the wisdom of the system of their home

country. Nor is it a matter of one approach being modern and the other not. The analysis of the approaches in other jurisdictions showed that the two types of system vary immensely as to issues such as (a) which relatives may apply for relief; (b) whether relief is restricted to dependents; (c) the effect of gifts and assistance in the testator's lifetime affect entitlements; (d) whether gifts made by a testator can be reclaimed by the estate; (e) which property is subject to the jurisdiction of the court to overrule the will; and (f) whether the protection against disinheritance is limited to a particular sum, and many other nuances.

4 This second part will seek to identity the options and the questions that should be dealt with. The key theme is that, when Jersey considers reform of protection against disinheritance, legislators should not fall into the trap of thinking that there are only binary choices between protection of heirs and testamentary freedom; and between the current Jersey approach to *légitime* and the English model of the Inheritance Act 1975.

D. Preliminary comments

Importance of local attitudes and conditions

5 In Jersey politics of the 19th century there were two rival factions, the Rose party and the Laurel party. Jersey Museum records that there was also a third force in Jersey politics, comprising those who assumed that the right way for Jersey was to do things in the British way in all matters. This is always a problematic assumption but imitation of the United Kingdom (and, in particular, England) is common for reasons given by Jonathan Sumption, QC before his career in the Jersey Court of Appeal was ended by elevation to the United Kingdom Supreme Court. Speaking in the context of why judges in Jersey are often wise to follow established English judicial practice, Sumption, JA said[1]—

> "In a relatively small jurisdiction, there will be many issues which arise too rarely for the courts to have generated a coherent body of indigenous legal principle. In the interests of legal certainty, it is undesirable for the courts to reinvent the legal wheel each time that an issue of principle arises which is not covered by existing Jersey authority when there is a substantial and coherent body of case law available *from a jurisdiction with which Jersey has close historical links, with which, on most issues, it shares common social and moral values and a common legal culture, and from which it derives most of its criminal statutes*." [Emphasis added.]

[1] *De la Haye v Att Gen* [2010] JCA 092, at para 79.

6 There is undoubtedly a strong argument that, were Jersey to wish to abolish *légitime* in favour of a court-based discretionary system, it should not try to create a wholly novel system from scratch. There would be an advantage to judges in Jersey not working out afresh dilemmas which have direct equivalents in English (or, indeed, Irish) case-law. Adopting the English system would effectively import the English case-law on legal principles which, as with *Ilott v Blue Cross*, does not provide certainty as to outcome but at least the degree of uncertainty will be known from the start.[2] To create a new system might simply mean that Jersey courts would take decades to reach the same position.

7 However, if the comparative review in the first instalment of this article has demonstrated anything, it is that there is no right or wrong answer to the question of whether testamentary freedom should be restricted by a fixed-rules system such as *légitime*, or a court-based discretionary system such as the Inheritance Act 1975. If jurisdictions such as New South Wales, Ireland, Gibraltar and New Zealand have all taken the court-based discretionary approach, it should be recalled that all of these jurisdictions started from the English tradition of testamentary freedom. On the other hand, there is a very strong consensus in European jurisdictions outside England and Wales to continue a fixed-rule system guaranteeing inheritance rights to adult children. There is a conflict of ideas but it is not one between modernity and out-dated paternalism. The right system for a society is a function of its outlook on the social and philosophical issues around testamentary freedom, whether adult children have claims on their parents, and whether the idea of "family money" is a misnomer.

8 Of course, history and tradition is not a complete argument as to why something should continue to be done. Meryl Thomas and Brian Dowrick in an article in this *Review* on *légitime* reform concluded by saying that Jersey's approach was closer to that of civil law countries than common law jurisdictions.[3] This accounts for why Jersey's law on this subject is currently more like continental Europe than the common law world but it does not necessarily explain what is right for Islanders today.

9 There is, unfortunately, a dearth of information on what people in Jersey actually think. In the absence of any material that achieved a higher rate of responses, we must look to the recent consultation by the

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[2] [2017] UKSC 17, see in particular the first instalment of this article, at paras 62–67,

[3] Thomas and Dowrick, "The Future of Légitime—*vive la difference*" (2013) 17 *Jersey & Guernsey Law Review* 305.

Trust Law Working Group ("TLWG"). The consultation asked specifically about a trust law issue relevant to *légitime*, but also asked a general question as to whether there should be reform of *légitime*.

10 The responses to the TLWG consultation grouped as follows[4]—

(a) six law firms responded to the questions on *légitime*;

(b) three trust companies responded to the questions on *légitime*;

(c) four individuals responded to the questions on *légitime*, of whom two were lawyers; and

(d) two associations gave brief comments.

11 Although only asked for an opinion on reform of *légitime*, the following views were expressed on the abolition of *légitime*—

(a) four of the six law firms supported abolishing *légitime*,[5] the other two suggested consideration be given for broad reform;[6]

(b) of the trust companies, two supported abolition. One simply said, "yes" to the idea that there should be reform, which could mean anything from abolition to fine-tuning;

(c) of the individual responses—

  (i) individual A was passionately against *légitime*;

  (ii) individual B was passionately in favour, and gave a family story to explain why;

  (iii) individual C (a lawyer) was neutral as to reform; and

  (iv) individual D (a lawyer) was passionate in favour of *légitime*, and set out his reasons at length;

(d) both associations thought that reform of *légitime*, should be given. One association was favourable to the English model, but thought it was "a matter of principle . . . for Jersey residents to decide."

12 In respect of consultations on *légitime*, as with most things, it is important to place the views of lawyers in their proper perspective. Such views are doubtless important in terms of identifying inefficiencies in a system, advising on the workability of alternatives, and knowledge of client concerns. However, whilst lawyers will

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[4] *Trust Law Working Group Consultation*, see the first instalment of this article, fn 5.
[5] *Ibid*, Law Firms A, E, F and I.
[6] *Ibid*, Law Firms C and D.

almost certainly figure heavily amongst those responding to a consultation of this sort and will have much in the way of practical experience and suggestions to contribute, the aim of any law reform must be to give the right answer for the people of the Island. Such an answer must take into account the economic effects of the doctrine of *légitime* insofar as the doctrine may deter some high net wealth individuals from moving to Jersey. But the system also needs to work for Jersey as a whole, and not just for the group most likely to grab the attention of lawyers and the finance industry. There may need to be considerable compromises of some interests but those interests should at least be firmly in view.

13 But any consultation must have at the forefront the position of ordinary Jersey residents. For example, the importance of inheritance is a function of the importance of possessing capital. When the importance of possessing capital increases (*e.g.* because opportunities of accumulating fresh capital from income are restricted), this may increase the social significance of the redistribution of capital accumulations by older generations.[7] The importance that a society attaches to inter-generational solidarity within families may rise and fall, and will be relevant to the importance attached to protection against disinheritance—including whether a court-based discretionary system emphasises moral claims (as per Ireland), or need (as per New South Wales).

14 With this in mind it is important for legislators—and any concerned Islanders who participate in any public debate on the subject—to consider the full range of options and issues as to the "whether" and "how" of reform in these areas.

E. Human rights and discrimination

15 It has been argued that the present system of *légitime* gives rise to concerns in respect of human rights and discrimination. It is useful to deal with such matters upfront. As there is often an assumption that "rights are trumps", to use Ronald Dworkin's famous *dictum*,[8] raising

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[7] For example, the New South Wales legislation talks in terms of obligations to assist in "advancement" of family members (see paras 105–106 of the first instalment of this article), by way of giving capital sums to assist adult children. The need for such "advancements" is greater if equivalent amounts cannot be accumulated readily through income. The modern difficulty of housing deposits is a possible example.

[8] Ronald Dworkin, "Rights as Trumps" in Jeremy Waldron ed, *Theories of Rights* (Oxford University Press, 1984).

such issues may serve to warn non-lawyers off from considering the underlying rights and wrongs.

16 However, to say that human rights are in play will immediately raise questions of justification; the same is true of discrimination, which also raises questions of whether the person making the accusation of discrimination is comparing like with like. These are issues that are eminently suitable for public debate and legislative decision. Indeed, when courts are faced with issues of justification for any measure, it is important that they know that the decision made by the legislature or executive was intelligently reasoned, taking into account relative factors. If it is, the courts are more likely to defer to the decision-making body.[9]

(i) *Human rights concerns*

17 The Jersey Finance Ltd paper made multiple mentions of human rights concerns in the context of the history of the consideration of *légitime* reform, in particular in respect of a report by Professor Meryl Thomas.[10] Professor Thomas has long taught the law of succession in the Jersey law course, and is in an unparalleled position to comment on that system.

18 However, as set out above, Professor Thomas's concerns related solely to the issues of differential treatment for legitimate and illegitimate children.[11] Her particular concern was as to the position of "recognised" children. By reason of the enactment of art 8A and 8B of the Wills and Succession (Jersey) Law 1993, there are no outstanding human rights issues. When she and Brian Dowrick wrote their 2013 article on *légitime*, they started with a clear statement that demands for abolition or reform "can no longer be based on the argument that *légitime* does not comply with the provisions of the European Convention on Human Rights".[12]

19 Anyone considering the rights and wrongs of reform should be clear that human rights law takes no view on the rights and wrongs of fixed-rule protection against disinheritance as against court-discretion systems.

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[9] *Miss Behavin' v Belfast City Council* [2007] UKHL 19; and *In re Application by Denise Brewster for Judicial Review* [2017] UKSC 8.

[10] *Jersey Finance Report*, at paras 1.3, 2.26–2.27 and 2.46; see the first instalment of this article, at fn 4,

[11] See the first instalment of this article, at para 26.

[12] Thomas and Dowrick, *op cit*, at para 1.

(ii) *Discrimination and persons of high net wealth*

20 The discrimination argument was raised directly by Jersey Finance Ltd in the context of whether trust law could provide the solution to the problem of deterring potential wealthy immigrants from moving to Jersey. If we accept that the costs of creating and maintaining a trust are a significant deterrent on their use, then the use of trusts to opt out of *légitime* is materially more available to those with greater wealth. Jersey Finance suggested that it followed from this that the use of trusts as a mechanism to opt out of *légitime* was discriminatory[13]—

> "The issue of *légitime*—as it impacts upon the Trusts (Jersey) Law 1984 (the TJL 1984) was considered in the last round of meetings of the Trusts Law Working Group (TLWG). The TLWG concluded (for a number of practical and commercial reasons) that the references to *légitime* contained in Article 9(1) and (3) of the TJL 1984 should be removed.
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> However, the TLWG were minded not only of previous considerations surrounding *légitime* more generally, but also of the potential ramifications of its request. The TLWG were keen to avoid any prospect of an amendment to the TJL 1984 being considered as 'discriminatory' *i.e.* enabling the avoidance of *légitime* by those wealthy enough to establish a Jersey trust, whilst denying the general public the same testamentary freedom through a correspondent amendment of the [Wills and Succession (Jersey) Law] 1993."

Although framed in terms of trust law, the discrimination objections would apply wherever the solution was targeted so as to be more readily available to particular types of people.

21 As explained at the very beginning of this article, the immediate argument for abolition or reform of *légitime* lies with concerns over its effect on Jersey as a place to live for those with considerable assets.

22 One law firm responding to the consultation explained why *légitime* is a disincentive for individuals with significant assets from moving to Jersey—

> *"*It has become apparent that law firms in England (such as [W—]) are referring ultra-high net worth individuals looking to relocate offshore to Guernsey (as opposed to Jersey) because Guernsey no longer has any restrictions on testamentary dispositions. This is resulting in business (and ultimately income that could be enjoyed by the Island) going elsewhere.

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[13] *Jersey Finance Report*, *op cit*, at the summary.

> We have clients that have relocated to Jersey only then to find out about *légitime* when coming to us for legal advice. The majority of clients have expressed strong views on *légitime* and some have seriously contemplated not changing their domicile purely on the basis of *légitime*—even though in some of these cases it results in them potentially falling within the IHT régime in England, thereby subjecting their worldwide estate to 40% IHT on death. In addition, at least two couples have contemplated relocating to Guernsey in order to avoid *légitime*."

23 This is a world apart from the concerns of those involved in the *Ilott* case. It is a world with little connection to those with comparatively modest estates but instead belongs to that of people with estates running into the tens if not hundreds of millions of pounds. Such people can choose where they live and Jersey seeks to attract them to the Island with an immigration system which confers tax advantages under the Income Tax (Jersey) Law 1961 to persons of high net wealth or who are otherwise able to make an exceptional economic or social contribution.[14] Most come from the United Kingdom, and whilst many will have no objection to splitting a third (or two thirds if widowed) of their property amongst their children, some doubtless have objections to being required to do so. It need not be matters of estrangement; it could be the approach famously adopted by those such as Bill Gates, or Warren Buffett, or Gordon Ramsay, *i.e.* that no child should inherit so much that they need never work hard themselves.

24 An obvious response is that, if the impetus for reform/abolition lies with the particular concerns of the wealthy, then cannot these concerns be dealt with in isolation without abolishing *légitime*? To raise that question requires confronting the issue of whether having provisions more accessible to those of high net value will be discriminatory.[15] The law must address—as most laws do—people with different but overlapping concerns and interests. A solution to the problems of one section of the population may be a problem for another. It is true that there should not be one law for the rich and another for the rest, but this may gloss over many practical arguments in favour of provisions that particularly target people in different circumstances. There is indeed already differential treatment for tax purposes in that special treatment is accorded under the Income Tax (Jersey) Law 1961 for

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[14] Regulation 2(1)(e) of the Control of Housing and Work (Residential and Employment Status) (Jersey) Regulations.

[15] Although differential treatment by reference to wealth would not be relevant for the purposes of the Discrimination (Jersey) Law 2013.

certain "wealthy immigrants". In respect of protection against disinheritance, would it somehow be better to make just one more provision that favours the rich?

25 Ultimately, any allegations of discrimination cannot be based on a simple accusation of a difference being made either directly or indirectly. To see if the vice of discrimination exists, there is a need to take a rigorous examination of the circumstances leading to two separate but connected steps: (a) deciding if the things being treated materially differently are the same, and (b) if so, whether the different treatment is justified.[16] Hence, it can be seen—

(a) If the reason for reforming *légitime* is a conviction that testators should have greater testamentary freedom, then there is no material difference between a rich and a not-so-rich testator, nor any difference between someone who currently lives in Jersey and someone who chooses to live in Jersey in the future; *but*

    If one of the reasons for reforming *légitime* is a concern for the particular issues of the super-rich being obliged to leave such enormous sums to children who need never work, then the super-rich do not sit in the same position as others.

(b) If it is believed that Jersey creates economic loss for itself because *légitime* deters individuals of high net wealth from coming to Jersey, then—

    (i) There is a material difference between those with or seeking reg 2(1)(e) status and other Jersey residents by virtue of the fact that the class of high net worth individuals may or may not choose to become Jersey residents by reason of the state of Jersey law; and

    (ii) There is an economic justification for making a distinction.

26 The last paragraph has sought to underline the fact that the complex issues involved in protection against disinheritance cannot be readily reduced to invocations of discrimination. For example—

(a) Denmark has a system which limits the extent of relief that can be available to claimants to €135,000. This obviously means that their system restricts freedom much more for testators with small estates than large ones. However, if a view is taken that no one can deserve more than €135,000 by way of inheritance, then such

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[16] See Hale, "The Quest for Equal Treatment", [2005] *Public Law* 571.

a difference of effect is inevitable, and justifiable by reference to the policy.

(b) The costs of any inheritance disputes are obviously more damaging to smaller estates than larger ones. A system such as the Inheritance Act 1975 may formally place larger and smaller estates in a position of equality, as all affected persons may challenge the reasonableness of testamentary provisions. However, such challenges will not be equal in their practical consequences for the value of the estate. If the costs of bringing and defending a challenge were to be £100,000, that is a considerable proportion of an average movable estate, but not so for large estates.

(c) Jersey residents with significant estates are already able to avoid *légitime* to a very large extent. Even were it the case that trusts would not be practical or cost effective for the average Jersey testator, that person would have testamentary freedom in respect of their house and could realistically convert any movable property into immovable property in their lifetime. Such strategies are less available for those of high net worth. It is one thing to plough £500,000 or £1m into immovable property to keep it away from the children; quite another to do so with £50m–£100m. So it is already the case that the principal avoidance strategy against *légitime* is entirely open (viewed from the perspective of percentage of the asset concerned) to ordinary Jersey residents. If a trust route would be more open to the rich, it could be seen as levelling the playing field.

27 It is thus important not to see "discrimination" as a broad spectrum ethical antibiotic to solve complex issues such as those around (a) the choice between a "fixed-rule" or a "court-based discretionary" system, and (b) the detail of such regime. It is, in this context, simply an accusation thrown by someone who has already decided that the other side is wrong. It does not help the undecided to make up their mind.

F. Specific Issues for consideration (and associated questions for consultation)

(i) *Special treatment for non-residents / Regulation 2(1)(e) residents*

28 The European Succession Regulation allows individuals to opt out of the inheritance jurisdiction of their country of residence and back into their country of citizenship. Could an equivalent be introduced in Jersey to allow those coming to Jersey to avoid falling into the rule of *légitime* should that be their wish?

29 However, there are significant problems with adopting this approach—

(a) With the European Succession Regulations, an individual does not just opt out of the rules of their host member state, but back into the rules of their country of citizenship. This is possible because EU law ensures that the country of citizenship accepts jurisdiction. Jersey could not achieve this balance unilaterally.

(b) If Jersey cannot ensure that the country of citizenship would have jurisdiction over the relevant assets, could the Jersey courts resolve the matter by applying the relevant foreign law? This is theoretically possible, as foreign law is something that often needs to be proven before domestic courts, and is found as a question of fact using expert evidence.[17] However, whilst many Jersey practitioners and judges would be familiar with the English law (or at least come up to speed easily), there are scores of nationalities in Jersey. It would be a difficult matter for the Royal Court to sensibly rule on matters of very unfamiliar foreign law, and often prohibitively expensive to bring before the court the necessary expert evidence for it to embark upon the problem.

30 More practical would be to allow those who are in a position equivalent to that described by the European Succession Regulation (*i.e.* living in one place but not as a citizen) to simply opt out of *légitime*, and leave it at that. This might be straightforward on a technical level where non-UK nationals are in issue but it becomes more difficult to draw the dividing line where UK nationals have moved to Jersey—

(a) Would a person who has acquired Jersey residential qualifications after 10 years count as a "Jersey citizen" rather than just the United Kingdom?

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[17] *MCC Proceedings Inc v Bishopsgate Investment Trust* [1998] EWCA Civ 1680.

(b) Or would the dividing line be permanent Jersey residence?

(c) Or should those with residency status under reg 2(1)(e) of the Control of Housing and Work (Residential and Employment Status) (Jersey) Regulations 2013 be treated as something other than "Jersey citizens" for this purposes?[18]

31 As noted in para 25, above, the law already provides those with reg 2(1)(e) status certain advantages. There is already a two-tier system of law for reg 2(1)(e) residents under tax—they are taxed differently under art 135A of the Income Tax (Jersey) Law 1961, so is it any more inequitable if their estate has privileges under the Wills and Succession (Jersey) Law 1993? Taxing statutes and protections against disinheritance are both ways in which the state interferes with the free use/retention of property. If one set of advantages (*i.e.* preferential tax treatment) are offered to induce persons of high net wealth to move to Jersey, why not a further advantage in terms of testamentary freedom.

32 However, there are disadvantages beyond natural concerns that legislators have in creating a separate law for the rich. If individuals, particularly those with a definable reg 2(1)(e) status, can opt out of *légitime*, then what do they opt back into? Many with that status will have lived in Jersey for decades by the time they die. Their heirs may well have been born and grown up here. If we allowed a simple "opt-out" system for those with reg 2(1)(e) status, then their relatives would lack protection both under Jersey law and under the law of the reg 2(1)(e)'s "ancestral" home country. All jurisdictions appear to regard as objectionable a system where there was absolutely no protection against disinheritance—so it would be a little odd for Jersey to create such a result because it was uneasy that its system might be overgenerous to children.

33 In short, such an opt-out from the Jersey law of *légitime* would permit the very rich to opt into a system of absolute testamentary freedom. Jersey would create for such people a legal position that appears to exist nowhere.

34 Hence, the question to ask is—

Q.1 Is it feasible or justifiable for those granted reg 2(1)(e) residential status in future to be permitted to opt out of the testamentary restrictions created by *légitime*?

(ii) ***Use of trusts and légitime***

[18] *I.e.* those granted residency due to being of high net wealth or otherwise able to make an exceptional contribution to Jersey's welfare.

35 The recent consultation on *légitime* centred on whether the Trusts (Jersey) Law 1984 should be amended to change the relationship between trust law and Jersey.

36 The relevant provisions are these—

> "9(1) Subject to paragraph (3), any question concerning—
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> (a) the validity or interpretation of a trust;
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> (b) the validity or effect of any transfer or other disposition of property to a trust;
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> (c) the capacity of a settlor;
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> (d) the administration of the trust, whether the administration be conducted in Jersey or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment or removal;
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> (e) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment and the validity of any exercise of such powers;
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> (f) the exercise or purported exercise by a foreign court of any statutory or non-statutory power to vary the terms of a trust; or
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> (g) the nature and extent of any beneficial rights or interests in the property,
>
> shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question.
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> (3) The law of Jersey relating to *légitime* shall not apply to the determination of any question mentioned in paragraph (1) unless the settlor is domiciled in Jersey."

37 The purpose of the provision is found in the remedy known as *rapport à la masse*, see paras 39–42 of the first instalment of this article (pp 134–136). If the testator had in his lifetime given property to an heir (*i.e.* a child or a spouse/civil partner), then the other heirs may apply to the court for an order that the property should be restored to the estate. This Jersey law provision applies to gifts whenever made, which contrasts with the Inheritance Act 1975 where the clawback

provision applies only to disposals which are made (a) within six years of death, and (b) for the purpose of defeating the Act.[19]

38 However, the otherwise sweeping remedy of *rapport à la masse* has significant gaps in terms of preventing disinheritance in that addresses only favouritism towards particular heirs in the testator's lifetime. It does not extend to gifts made to third parties during the testator's lifetime.[20] Hence, an adherent to Andrew Carnegie's philosophy that "to die rich is to die disgraced" may give away everything in their lifetime, providing it did not go to a spouse/civil partner or children. Such a person may give everything away on their deathbed to charity, or even to relatives other than their descendants—whereas a claim for the estate to recover such property could be made under the Inheritance Act if the other statutory conditions were present. So, there are aspects to *rapport à la masse* which are more favourable to freedom to dispose of property than the Inheritance Act 1975 equivalents.

39 This is where we must consider the use of trusts to avoid *légitime*. Conventional wisdom is that gifts to heirs by way of trusts count as advancements on inheritance, although the principal authorities to the point do not expressly decide the point.[21]

40 The purpose of art 9(3) of the Trusts (Jersey) Law 1984 was thus to limit the scope of *légitime* (and thus the remedy of *rapport à la masse*) to trusts where the settlor is domiciled in Jersey. There are two points to underline—

(a) art 9(3) does not expressly address the position of a settlement by a Jersey domiciled settlor into a non-Jersey trust; and

(b) art 9(3) applies to disapply the doctrine of *légitime* when the "settlor is domiciled in Jersey". Does this mean that the settlor need only be domiciled in Jersey at the time of death, when the doctrine of *légitime* comes into effect? Or does it mean at the time of the transaction, which is when the presumption of advancement of inheritance arises? Can someone be said to be advancing an inheritance if they were at the time subject to a law where such concepts making no sense?

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[19] Although it does not apply to routine support that parents give to children, see para 40(a) of the first instalment of this article.

[20] *Loi (1834) sur le retrait foncier*. *Joslin v Cabot* (1894) 216 Ex 535, this also applies where the recipient of the gifts in life was also a legatee.

[21] *Robertson v Lazard* 1994 JLR 103, and *Best v Caprea Trustees Ltd* [2007] JRC 100A.

41 The first point is quite straightforward. The Trusts (Jersey) Law is to do with Jersey trusts. It does not purport to make any difference to how settlements into non-Jersey trusts would be addressed by doctrines such as *légitime*. The conventional wisdom that gifts by way of trusts fall into the doctrine of *rapport à la masse* remains as good (or not) as it ever was.

42 It is the second point that needs considering. If the doctrine of *légitime* does not apply to settlements made before a settlor becomes domiciled in Jersey, then trusts are a means of those taking up reg 2(1)(e) status to arrange their affairs before moving to Jersey. As a matter of grammar, art 9(3) is capable of being read in both ways, that is, (a) "the settlor is", present tense, at the time *légitime* becomes an issue, or (b) "the settlor is" meaning when they are carrying the action of being a settlor. If the former approach were to be preferred, then the effect of the law of Jersey would be that, by becoming domiciled in Jersey, the rights of beneficiaries in a trust may be effectively changed by imposing on heirs a duty to return money to the estate depending on the terms of the settlor's will. It is also far from clear that the law of Jersey has ever sought to apply *rapport à la masse* to transactions predating the link to Jersey.[22] Given these difficulties, if the provision was meant to address settlors by virtue of being domiciled at the time of death, then this could have been said clearly.

43 It should also be noted that art 9(3) started life in art 8A of the Trusts (Jersey) Law 1984, inserted by the Trusts (Amendment) Law 1989—

> "(2) If a person domiciled outside Jersey transfers or disposes of property during his lifetime to a trust—
>
> (a) he shall be deemed to have had capacity to do so if he is at the time of such transfer or disposition of full age and of sound mind under the law of his domicile; and
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> (b) no rule relating to inheritance or succession (including, but without prejudice to the generality of the foregoing, forced

[22] The remedy of *rapport à la masse* can apply where original the transaction conferring the transaction pre-dated Jersey residence, *e.g. Channing v Harrison* 1967 JJ 845, where the £400 was paid into a joint account in Willesden Green in 1958, the couple moving to Jersey the following year. However, the point in *Channing v Harrison* was not that there was any relevant gift in 1958, but rather that the husband's share of the account passed to the wife on death by virtue of survivorship. The "transaction" that was subject to *rapport à la masse* was thus the passing of the husband's share on death, at which point he was resident in Jersey.

> heirship, "légitime" or similar rights) of the law of his domicile or any other system of law shall affect any such transfer or disposition or otherwise affect the validity of such trust."

44 Article 8A of the Trusts (Jersey) Law was renumbered as art 9, and was changed to its present form by the Trusts (Amendment No 4) (Jersey) Law 2006. The relevant Jersey States Assembly Proposition 29/2016. Nothing in the report or proposition suggests any policy change. The Report states—

> "The purpose of the Amendment is to clarify and simplify the existing Law, and to bring greater certainty to key questions concerning the validity of Jersey trusts and the powers that may be retained by the settlor of a Jersey trust."

45 Given that the wording in the amendment is ambiguous, then it is right for the construction of the present art 9(3) to be informed by the previous wording. Resort to earlier versions of the legislation is common when attempts by the draftsman to improve drafting create novel ambiguities.[23] Article 8A(2) was radically changed, which appears to forbid use of legislative history, but on closer analysis there was no change in what was intended. The problem with art 8A was that it assumes that *légitime* affects testamentary capacity, when it is a means for children and spouses to apply (if they choose) for relief from the court. The move from art 8A(2) to art 9(3) was not a change of policy or intended result, but the aim was for the statute to employ the legally appropriate language and concepts. The language of art 8A(2) was clearly there to remove transfers and disposals made by non-Jersey domiciled persons from the scope of *légitime*. There is no suggestion that any change was intended in this respect.

46 To conclude on this issue, the most sensible construction of art 9(3) is that it takes out of the scope of *légitime* transfers and disposals made by non-domiciled persons. This avoids retrospectively unsettling transactions, and appears to be in harmony with pre-existing Jersey law on the scope of *rapport à la masse*. This conclusion is also supported by relevant legislative history in the former art 8A(2). It follows that someone who is applying for reg 2(1)(e) status or otherwise considering moving to Jersey can settle money in a Jersey trust without being concerned about *légitime*.

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[23] *E.g. HMRC v Lloyds Leasing (No 1) Ltd* [2013] UKUT 318 (TCC) at para 60 *et seq* where the simplification of capital allowances legislation represented by s 123 of the Capital Allowances Act 1981 necessitated tracing the relevant provision through several predecessors.

Légitime and settlors who retain an interest in settled property

47 It should be noted that the use of trusts to avoid *légitime* creates two different issues—

(a) as a delivery mechanism of assets to children who would get more than "their fair share", and

(b) as a means by which a settlor can retain use of property in life, thus avoiding the need to give the property by way of a will, when *légitime* is unavoidable.

48 It is the second issue that is considered in this short section. What if a gift in the life time is in fact only given on death—is that not a form of avoiding *légitime*? A trust can be used to simultaneously give property away, and yet retain an interest in it.[24] A considerable amount of UK anti-avoidance tax law aims at eliminating all possibility of a settlor having any possible future enjoyment of the property,[25] although, as all law students know, the area can be highly technical with unexpected failures leading to unexpected liabilities.[26] This is because the policy behind the UK tax legislation requires that an individual should not be treated as having given away property, having created a structure whereby he can enjoy it if he really wants to. If Jersey wants to be strict on what amounts to avoiding *légitime*, then similarly a person should not be able to use a trust so that they only part with property on death—because parting with property on death is something that should be done through the laws of succession and by making a will.

49 However, the anti-avoidance doctrines in *légitime* do not attempt to take such a purist view. The rules address gifts to heirs by looking solely at the advantage of the heir—the rules do not address avoidance strategies around the position of the testator. There is no rule to prevent the testator giving more than the "disposable third" to non-heirs, whilst retaining significant enjoyment (but not ownership) of the property and its income within the testator's lifetime.[27] The Scottish authority of *Coats's Trs v Coats*,[28] provides a strong persuasive authority that doctrines such as *rapport à la masse* are not capable of

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[24] The Jersey law maxim of *donner et retenir ne vaut* (*i.e.* one cannot give and retain) does not apply to trusts, see s 9(5) of the Trusts (Jersey) Law 1984.

[25] *E.g. Ingram v Inland Revenue Commissioners* [2000] 1 AC 293.

[26] *E.g. Vendervell v IRC* [1967] 2 AC 291.

[27] Classically, this would have been difficult due to the lack of trusts in Jersey law, and the ancient doctrine of *donner et retenir ne vaut*, see above, fn.24.

[28] *Coats's Trustees, op cit*, at 748–749, see *supra.*

expansion by analogy. Hence, it is questionable whether it should be brought into the field of discretionary trusts where the heirs have no enforceable rights to any benefits.

Proposals for reform

50 The reason for the Trust Law Working Group consultation questions on *légitime* was essentially this: should it be possible for a testator to take property outside of the scope of *légitime* by way of a trust.[29]

51 The reason for this being of acute interest today is that, as explained above, objections to *légitime* have arisen amongst persons of high net wealth, who are deterred from either moving to or staying in Jersey by reason of losing testamentary freedom.[30]

52 The question arises as to whether the law of Jersey should be reformed so that gifts into trusts made in the testator's lifetime should be excluded from the scope of *légitime*.

53 The advantages of using trust reform to deal with concerns in respect of *légitime* are—

(a) Persons with significant assets and concerned to avoid *légitime* could put money into trust which on their death would accrue to their children or any other person of their choice without *rapport à la masse* applying (*i.e.* the assets could not be brought back into the estate, and then redistributed in a manner contrary to the wishes of the testator).

(b) The reform could allow for significant control of the benefit of the trust by the settlor in his or her lifetime.

(c) The settlor need not alienate all of his or her lifetime interest in the property.

(d) The use of family trusts settled in a testator's lifetime are common means for managing wealth where significant amounts are in issue, as is the concern of Jersey Finance Ltd.

(e) If we adopt the English Inheritance Act approach, wills would be subject to new forms of uncertainty, including challenges under

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

[30] Jersey Finance Report, *op cit*, at para 1.4. These concerns are unlikely to apply to those of high net wealth moving from continental Europe, as they will be moving from a country where there is already a fixed-rule system of protection against disinheritance, so Jersey's system of *légitime* is unlikely to be a deterrent. But most such moves will involve the British Isles.

an equivalent to art 10 of the Inheritance Act 1975 (*i.e.* transactions within six years of death to defeat the possibility of claims under the 1975 Act). By adopting a trusts solution within the structure of *légitime*, we could avoid testators being in the position of having to make a "calculated risk" that the decision to "disinherit" would have problems in the court, as is the case with the 1975 Act.[31] A trusts solution within *légitime* would provide certainty.

(f) For reasons set out above—

(i) Where a person sets up a trust prior to moving to Jersey (*e.g.* after grant of reg 2(1)(e) status, but before taking up residency), then art 9(3) of the Trusts (Jersey) Law 1984 already operates in their favour.

(ii) A settlor can avoid *légitime* insofar as the trust does not make absolute gifts to his or her children, *e.g.* includes other relatives, friends, good causes as beneficiaries of a discretionary trust.

(iii) There is no rule in *légitime* equivalent to that found in UK tax legislation that, if a settlor can benefit from a trust, he or she is treated as remaining the owner. Hence, the fact that a settlor retains enjoyment of trust property to any degree will be irrelevant to the fact that a gift had been made during his or her lifetime, and not as a disguised testamentary procedure.

Hence, law reform in this area can reasonably be seen as bringing clarity rather than change.

54 The disadvantages or objections to using trusts for reform are—

(a) If we accept that the costs of creating a trust are a significant deterrent on their use, then the use of trusts to opt out of *légitime* is materially more available to those with greater wealth.

(b) Jersey Finance Ltd's logic, combined with that of the Trust Law Working Group, appears to be this—

(i) It is a concern that persons of high net wealth may be deterred from moving to Jersey by reason of *légitime*;

(ii) The use of trusts may provide a means to deal with that problem;

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

(iii) But the use of trusts as a means to achieve testamentary freedom would discriminate against those of lower wealth, for whom structures are less available;

(iv) Just as the use of trusts in England and Wales to protect married women's property from rapacious husbands was only of use to the rich, so the use of trusts to avoid *légitime* would give testamentary freedom only to the rich.

(c) Conceptually, if there is a need to legislate to provide a means for people to avoid a rule of law, then this brings into question whether the relevant rule serves a good purpose. Unless the mechanism for reducing liability under the relevant rule has a value in itself (*e.g.* reducing liability tax by spending money on something socially useful, like charitable causes), then what exists is a means to avoid a rule of law by way of a pointless rigmarole. So if the rule concerned is useful, the valueless means of avoidance should be abolished; if the rule is not useful, then it should not be maintained for those who do not spend time and money avoiding it by doing something otherwise pointless. (However, it should be remembered, that where legislation must draw a balance, it may often result in a compromise that is theoretically unsound. A lack of theoretical purity is often not just tolerable to legislators but a necessary part of compromising the conflicting demands of different parts of a complex society.)

(d) Although family trusts are common, a settlor, by making a trust, may lose control or use of their property to a degree that they find unacceptable or at least premature. They may feel they are substituting one loss of control for another.

55 It follows that trusts provide a means for avoiding *légitime*, and are particularly useful for those considering moving to Jersey. There is uncertainty as to how far *légitime* applies to trusts. The relevant authorities are *obiter*.[32] The extent to which the doctrine of *rapport à la masse* can be extended by the courts by analogy is doubtful—the courts could take a strict approach to undoing advancements of succession, or draw a line in the scope of the doctrine as suggested by Scottish authority.[33] The only thing that is tolerably clear is that it does not apply to settlements prior to becoming domiciled in Jersey.

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[32] *Robertson v Lazard* 1994 JLR 103, and *Best v Caprea Trustees Ltd* [2007] JRC 100A.

[33] *Coats's Trustees, op cit*, at 748–749, see *supra.*

56 The questions that need to be considered in respect of these issues are thus these—

> Q.2 Should gifts into trusts be excluded from the scope of *légitime*?
>
> Q.3 If gifts into trusts are in principle excluded from *légitime* should there be any anti-avoidance rules? For example, the Inheritance Act 1975 allows for the clawback of dispositions made within six years of death for the purpose of defeating rights to make applications for relief under the 1975 Act, should there be something equivalent?
>
> Q.4 If gifts into trusts are to be excluded from the scope of *légitime*, is it necessary that the testator wholly dispose of his or her enjoyment of the property settled in the trust? In other words, should the testator be able to continue to enjoy benefits of ownership during his or her lifetime? Or would it be too complicated to take such a purist approach, noting the complexities created where UK tax law has of policy necessity sought to ensure that settlors could retain no interest?

(iii) *Reform of légitime*

57 Certain issues have arisen in the course of this paper where there is a tension between the arguments in favour of retaining *légitime* (or at least criticisms of the alternative approach) and the reality of *légitime* as it present exists.

58 The principal point is that *légitime* protects children from arbitrary decisions by the parents. It follows from the starting point that there is a concept of family property, against which children have expectations, and the fairest way forward is to guarantee an equal minimum. The explanation given to the European e-Justice Portal by the Federal Republic of Germany encapsulates the point[34]—

> "[A] situation in which the surviving spouse, children and children's children or parents were to receive no inheritance at all, even though they would have been the legal heirs if the testamentary disposition had not actually existed in the first place, has always been regarded as unjust."

59 However, the present system allows the following to happen—

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[34] https://e-justice.europa.eu/content_succession-166-de-en.do?member=1

(a) The parent to make entirely different provision for children (or disinherit them entirely) where immovable property is concerned. Hence, Jersey law may allow a child to be disinherited without any redress from what is typically the larger part of the parent's property.

(b) A parent who wanted to disinherit a child could simply convert cash investments (movable property) into land (immovable property) and thus gain absolute testamentary freedom.[35]

(c) A parent who wishes to disinherit a child can simply give their movable property on their deathbed to a third party and it will not be subject any clawback. In that respect, the Jersey system provides less protection against disinheritance than is found in England, where s 10 of the Inheritance Act 1975 allows for the clawback of dispositions made to thwart inheritance rights.

(d) Where a child has received a disproportionate share of the testator's immovable estate, that child can still claim that he/she should receive his/her legal share of the movable estate.[36] If the aim of *légitime* is to ensure a measure of equal treatment, the exclusion of dispositions of immovable estate from consideration is difficult to justify.

60 The Scottish Law Commission recommended as one of its options for "legitim" to reduce the entitlement of children from one third to one quarter but for the scope of the doctrine to be increased to cover immovable property. The Scottish Government was particularly concerned that the absence of what is usually the most important family asset from their doctrine of "legitim" greatly reduced the protection from disinheritance, particularly by providing a means for easy avoidance.[37]

61 As set out above,[38] the doctrine of *légitime* as currently expounded lacks the tools to enquire into whether a discretionary trust for subjects not limited to heirs is in substance a gift to heirs, or whether trusts for third parties are disguised testamentary procedures by reason of the settlor having in substance given to the trust but retained enjoyment for life. A proper consideration of the policies behind *légitime* will not just allow consideration of whether it should have any place in modern Jersey law, but how supporting doctrines such as *rapport à la masse*

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[35] *Loi (1960) modifiant le droit coutumier*.
[36] *Valpy v Valpy* (1716) 1 CR 66.
[37] *Scottish Government Succession Consultation, op cit*, at para 3.5.
[38] *Supra*, at paras 47–49.

can be reformed (or abolished) so as to meet modern issues thrown up by trusts.

62 Another issue arises around family relationships. There is no possibility of "children of the family" counting alongside natural and adopted children. Hence, consider this scenario—

(a) Adam marries Beryl.

(b) Beryl has a two-year-old daughter, Cheryl.

(c) Adam cannot adopt Cheryl, as the natural father, Daryl, remains in occasional contact.

(d) Adam is granted parental responsibility.

(e) After Cheryl becomes an adult, Beryl dies.

(f) Adam marries Edwina.

(g) Adam writes a will leaving everything to Edwina.

(h) Adam dies.

63 On such a scenario, Cheryl would have rights to make an application under most court-based discretionary systems—the lack of a biological relationship would not matter. Under Jersey's system of *légitime*, Cheryl has no rights. Whilst it is doubtless an advantage of court-based discretionary system that they can have the flexibility to recognise the full variety of human circumstances, consideration could be given to whether clear rules could be created in Jersey's fixed-rule system to recognise clear "child of the family" scenarios.

64 The Scottish Law Commission recommended that its version of *rapport à la masse* (*i.e.* recovery of gifts made by testator to other heirs) should be restricted to a duty for those challenging their provision under the will to bring back gifts that they had received. It would not be possible for a sibling (or parent or step-parent) to complain that someone had received too much from the testator in life, *e.g.*—

- Father T dies leaving £900,000 in cash. £400,000 goes to charity (*i.e.* four ninths). £300,000 goes to Spouse X (*i.e.* one third). £100,000 goes to Son A (*i.e.* one ninth). £100,000 goes to Daughter B (*i.e.* one ninth).
- However, Father T had given Son A £500,000, but nothing to his daughter.
- Both Son A and Daughter B, have received one ninth of the movable estate—when their legal entitlement was to a minimum of one sixth.

- Spouse X has received one third, which is her legal entitlement.
  (a) Under the Scottish proposals—
  - Son A cannot make a claim without bringing back his £500,000 gift, which would be foolish.
  - Daughter B can bring a claim but it will not affect the unequal disposition made in his life time by her father to Son A.

  (b) Whereas currently under Jersey law, as the gift to Son A was in excess of the "disposable third" of the testator's estate,[39] both Spouse X and Daughter B can make a claim for Son A's £500,000 to be returned to the estate, and for everything to be recalculated from there.

65 Such a system the Scottish Law Commission believed did greater justice than the system of collation which allowed (as with *rapport à la masse*) for the clawback of gifts made years earlier. It is worth noting that this underlines how it is not so simple as saying that a fixed-rule system favours children and spouses, and a court-based discretion system favours testators. Under the Scottish proposals, a gift to child would be final unless the child concerned decided to challenge the will—whereas in the English system, any transaction of the testator may be challenged if it was done to avoid the assets falling into consideration under the Inheritance Act.

66 The Scottish Law Commission raised the issue of restricting "legitim" (or, rather, a new fixed-rule system) to dependent children, this was their option 2. The theory behind such a move would be that the legal entitlement to the estate should only exist where there is a legal duty to support.[40] The entitlement would not be to a fixed amount of the estate, but to an amount calculable by fixed rules, *e.g.* the claim of a newborn would be higher than that of a child of 17 about to leave home. It is a claim for the loss of support to which a child would have had a legal entitlement from the deceased parent—and is not really out about moral claims to inheritance.

67 The questions for consideration in respect of the reform or abolition of *légitime* are thus—

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[39] *Le Cornu v Falle* (1917) 229 Ex 533.

[40] For Scottish purposes a dependent child as is defined at s 1(1) and (5) of the Family Law (Scotland) Act 1985 *i.e.* obligation to aliment ceases when the child reaches 18 or 25 if they are in appropriate education or training.

Q.5 If *légitime* is retained, should it apply to the immovable estate?

Q.6 If *légitime* were to apply to the immovable estate, should the proportions by which it applies be changed?

Q.7 Should *légitime* (or rather a different form of fixed entitlement) be restricted to spouses/civil partners and dependent children?

Q.8 If the answer to Q.7 is yes, then should the definition of "dependent children" be limited to those under 18 or in full-time education but no older than 24? Should it include dependent, disabled adult children?

Q.9 If there is a fixed entitlement for dependent children, is it possible to follow a "mixed" approach, and create a court-based discretionary system for other children?[41]

Q.10 Should the ability to apply to court to oblige other heirs to return property to the estate (*i.e. rapport à la masse) be abolished?*

Q.11 If *rapport à la masse* is not abolished, should there be a limit as to how far back it is possible to make a claim for a gift to be undone?

Q.12 Should *rapport à la masse* include gifts to third parties made for the purpose of defeating legal entitlements under *légitime*, *e.g.* importing the approach of the Inheritance Act 1975 to such dispositions where they are made within six years of death and made with an avoidance purpose?

Q.13 Where an individual claims their *légitime* they are required to bring back into the estate gifts of movable property made by the testator in his or lifetime. Should this apply to legacies of immovable property made under the will or before?

Q.14 If *rapport à la masse* is retained, should the rule in the *Loi (1960) modifiant le droit coutumier* excluding immovable property from the doctrine be abolished?

(iv) *Change to a court-based discretionary system for protection against disinheritance?*

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[41] Note that there is a mixed system in Ireland, with fixed rules for spouses and discretionary entitlement for children.

68 As has been explained at length, the question not a binary question of testamentary freedom against rights for children and spouses/civil partners, but the relative importance attached to both concepts in different areas. It is as Baroness Hale said in *Ilott v Blue Cross*[42]—

> "In his book on *The Inheritance (Family Provision) Act 1938* (Sweet & Maxwell, 1950), Michael Albery commented:
>
> > 'The protection of the rights of the family as an essential unit in society is a primary concern of most systems of law. Complete freedom of testation, as enjoyed under English law for a brief period of 47 years, is therefore by the standards of contemporary jurisprudence an anomaly.'
>
> In many modern legal systems, mostly those descended from Roman Law, complete freedom of testation is unknown. Members of the family enjoy fixed rights of inheritance to the estate of a deceased, which leave only limited scope for the deceased to make his own dispositions. In some systems, consanguinity is preferred to affinity. The claims of descendants of the deceased are favoured over the claims of a surviving spouse. The theory is that the property belongs to the family or lineage rather than to the owner for the time being and should pass down the blood line. Other systems favour affinity over consanguinity. Early English law also recognised certain fixed rights of inheritance, but these were only between husbands and wives, and the limited rights given to widows and widowers disappeared long ago."

What is now the Inheritance Act 1975 thus started life as a rejection of testamentary freedom.

69 Baroness Hale at length set out recent studies into attitudes *in England and Wales* into protection against disinheritance. She concluded[43]—

> "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,

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[42] *Ilott v Blue Cross* [2017] 2 WLR 979 at para 50.
[43] *Ilott, op cit* at paras 57–58.

> having earned a share by caring for the deceased or contributing directly or indirectly to the acquisition of his wealth.
>
> 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."

70 Of course, Baroness Hale was reviewing the history of opinion and research into opinion in England and Wales. Scotland is entirely different.[44] Whilst the English discussions have always rejected a move towards a fixed-rule system for protection against disinheritance, Scotland retains such a system and the present options for reform being discussed do not include moving to such a court-based discretion system.[45]

71 Ultimately it is a matter of what is right for Jersey, taking into account the size of estates, the prospects of litigation, and the extent of costs that may be incurred to by the affected estates. With this in mind the final comments must be these—

(a) Most important are the issues around costs of litigation—

  (i) The costs of litigation under the Inheritance Act 1975 typically fall to be paid from the estate.[46] The impact of this important aspect of the system creates a greater proportionate cost on smaller estate. Inheritance Act litigation where the amounts involved are in the hundreds of thousands may destroy the estate down considerably, whereas fixed-rule entitlements being clear could be cheaply enforced. Even if a court discretion based system were the ideal, it is necessary to consider whether it would be genuinely open to all, or open to all "like the Ritz".[47]

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[44] *Jersey Finance Report*, *op cit*, omitted Scotland from its review of the United Kingdom.

[45] *Scottish Government Succession Consultation*, *op cit*, at para 3.13.

[46] Whilst a failed claimant against the estate might have an order of costs against them, the representatives of the estate will need to recoup any outstanding costs against the estate. This means that if a claimant is reasonably successful (and Mrs Ilott was partly successful) significant costs will come from the estate.

[47] "In England, justice is open to all—like the Ritz", a comment attributed to the Irish Judge, Sir James Mathew.

(ii) The cost of the equivalent action in *légitime* ("*reduction ad legitimum modum*") is known to be a cheap action.

(iii) There may be greater costs when a *rapport à la masse* action is taken for an heir (*i.e.* descendant or spouse/civil partner) to return gifts to the estate. However the equivalent action under s 10 of the Inheritance Act 1975 would be possibly more complex, necessitating enquiry into the motives of the testator in making the gifts.

(b) In short, under the Inheritance Act 1975, a person who "disinherits" a child takes a "calculated risk" that an application may be brought, and that litigation will result.[48] In creating a risk of litigation, it must be noted that such litigation is likely to be more complex than where a challenge involves the application of a fixed rule, as is the case with an action for *rapport à la masse* under the rules of *légitime*.

(c) The Jersey Finance Ltd paper referred to "perfunctory and casual criticism" of the 1975 Act, as it being "unsupported by any evidence".[49] In particular, the paper criticised as unsupported the view that the Inheritance Act 1975 protections against disinheritance were "objectionable on the grounds of unpredictability and the likelihood of family acrimony". However, such criticisms have been powerfully spelt out by Baroness Hale (joined by the Supreme Court's leading family judge) when she concluded her speech in *Ilott v Blue Cross*[50]—

> "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."

(d) The *Ilott v Blue Cross* case makes it clear that the results of Inheritance Act litigation are uncertain—and that a very wide variety of outcomes were legally acceptable depending on the discretion of the first instance judge.

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[48] Sloan, "The 'Disinherited' Daughter, and the Disapproving Mother" (2016) 75 *Cambridge Law Journal* 31, at 33, see the first instalment of this article at para 66.

[49] *Jersey Finance Report, op cit*, at para 2.39.

[50] [2017] 2 WLR 979 at para 66.

(e) As is clear from *Ilott v Blue Cross*, the results turn on the approach of the first instance judge. Adoption of an Inheritance Act 1975 system ultimately delegates Jersey's approach to the small corps of first instance judges in the Royal Court.

(f) It should also be noted that the English/Welsh Inheritance Act 1975 system is not the only model for a court-based discretionary system—

(i) It would be possible to adapt the Irish Succession Act 1965 model which emphasises "moral duty". This carries with it the possibility of discharging that duty to particular children whilst alive.[51]

(ii) Similarly, the Irish system shows that it is possible to retain a fixed-rule system for spouses, and create a discretionary system for children.

(iii) It would be possible to have a fixed system for spouses and dependent children, and a discretionary system for non-dependent children.

(iv) The New South Wales system, which restricts claims to issues of "maintenance, education and advancement", which leads to greater statutory focus on the nature of the child's claim.

72 The questions to be considered are thus these—

Q.15 In principle should Jersey move to a court-based discretion system for protection against disinheritance?

Q.16 *Possibility of mixed system.* Should Jersey move to a court-based discretion system for children (or alternatively non-dependent children) but retain the present fixed-rule system for spouses/civil partners (*i.e.* the Irish model)?

Q.17 *Relevant property*. If Jersey moves to a court-based discretion system, will it be necessary for such a system to include immovable property in its remit as well as movable property?

Q.18 If Jersey moves to a court-based discretion system, should it adopt the English/Welsh Inheritance Act 1975 model? Are there aspects of other models that ought to be adopted?

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[51] See the first instalment of this article, at paras 103–107.

Q.19 *Applicants under a court-based discretion system.* If Jersey moved to a court-based discretion system, should the potential beneficiaries be broadened from the present system where only spouses/civil partners and descendants have protection? If so how, noting that the rules for who may claim differ between systems?

Q.20 *Basis of application*. Alternative, if Jersey moves to a court-based discretion system, should it adopt the Irish system of focusing on "moral duty" rather than the English system of "reasonable provision"?

Q.21 *Nature of relief that may be granted.* Alternatively, if Jersey moves to a court-based discretion system, should it adopt the English/Welsh approach to the support that can be claimed from the estate, or provide greater definition (*e.g.* New South Wales and "maintenance, education and advancement)?

Q.22 What arrangements should be made as regards costs of claims?

Q.23 Noting any equivalent areas of law where mediation has been used in Jersey (*e.g.* family law), to what extent is mediation likely to reduce concerns that a court discretion based system in Jersey will lead to the erosion of estates through litigation costs? Will there still be significant legal costs in terms of initial advice, advice on settlement, and settling contracts?

Q.24 Is it a concern that, following the critique made by the UK Supreme Court in *Ilott v Blue Cross*, that the adoption of the Inheritance Act 1975 system would mean that the ultimate balance between "testamentary freedom" and "protection against disinheritance" in Jersey will be depend on the discretion of whichever first instance Royal Court judge hears the case?

Q.25 If the breadth of discretion given by the Inheritance Act 1975 to first instance judges is a concern, are there any suggestions as to how to make decisions more systematic?

Q.26 If a new system were extended to address dispositions of immovable property, what changes would be required in respect of present rules in respect of dower and rights in the nature of dower under the Wills and Succession (Jersey) Law 1993?

Conclusion

73 Ultimately, whether Jersey remains on the continental side of the Channel in this issue, or moves to the English side, is not and should not be a matter for lawyers. It is a matter not of pure logic, and certainly not legal logic. It is true that attitudes in Jersey are likely to be influenced by attitudes coming from England and Wales, yet different attitudes will have come from Scotland, Portugal or Poland. Different attitudes again may have come from Ireland, where a court-discretion based system of protection against disinheritance exists for children (but a fixed-rule system exists for spouses), and where issues of moral duty are more to the fore in the use of the court's discretion.[52]

74 It is noted that the near neighbours of Guernsey and Alderney have both changed to the English system.[53] However, the extent of debate on the subject was called into question by Sir Vic de Carey, the former Bailiff of Guernsey.[54]

75 The purpose of this article, as with the review by the Law Officers on which it is based, is simply to draw attention to the complexity of the subject. If Jersey is to abandon a part of its civil law inheritance, it should not do so on the basis of misguided invocations of modernity or discrimination. It should be abandoned, if at all, for the one good justification for all law reform in Jersey—does the law still work for the good of Jersey as perceived by the people of Jersey?

76 What should be clear is that there are considerable difficulties with the present English legislation. There has been a call by the Supreme Court for it to be reformed. If Jersey wishes to take the step towards a court-based discretion system, it should consider aspects from legislation in other states. For example, legislators might wish to better define the nature of the moral obligation that gives rise to an entitlement to an adjustment in a will. The explanation in the Supreme Court that widely different results can legitimately be taken by first instance judges under the Inheritance Act is a strong argument against simply adopting the English approach.

77 As regards Jersey's system of *légitime*, if the concept of a fixed-rule based system is preferred, there are many obvious ways in which Jersey's current system fundamentally fails to carry through that logic.

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[52] See the first instalment of this article at paras 69–80 as regards Scotland, and at paras 103–107 as to Ireland.

[53] *Ibid*, at paras 98–101 and 102, respectively.

[54] 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. See *ibid* at para 109.

The fact that immovable property is left out of account can create capricious results. If we believe in the moral rights of spouses and children to inherit, then this should apply to the major asset of most estates. Also the present law allows an unscrupulous child who receives the bulk of their parent's estate in the form of land to present themselves as disinherited for *légitime* purposes, concerned only as it is with movable property. The issues of the finance sector can be considered without the assumption that the solution must be universal, or of equal use to all in Jersey regardless of wealth. The use of trusts to avoid *légitime* does run against the basic philosophy of the doctrine but not against the idea that is always a balance that is sought. They can be considered. But possibly the real answer to the concerns of the super wealthy are found in the Danish approach.

78 There is no reason why *légitime* should apply to the entirety of a testator's approach. In Denmark, a disinheritance claim is limited to €135,000. That might be a little low, but the Danish approach shows that there are easier ways to deal with the legitimate concerns of those of high net wealth than to embrace the English system. The question of a cap to *légitime* claims can be considered. Of course, some will wish to disinherit children completely—some for reasons of stern parenting, some out of malice, and some because the children cannot be trusted with money. It is impossible to cater for all. However, thought should be given to the New South Wales approach that moral claims on parents diminish if previous support has been given—there is no reason why the cap on claims should not take into account gifts made to the child, unless such gifts are brought back into the estate. That doubtless raises questions as to how to operate the doctrine of *rapport à la masse*.

79 Lord Hoffmann in *Re Barker* said[55]—

> "I am conscious of the pride which the legal profession in this Island takes in its unique legal system but such pride can only be justified if the legal institutions are sufficiently adaptable to enable the Court to do justice according to the notions of our own time."

Ultimately, if the desire is to retain *légitime* then there must be a comprehensive analysis of how to reform it, such as undertaken in Scotland. There is nothing un-modern about a fixed-rule system, but if there is to be fixed-rule system, it needs to be more internally coherent than the present set of rules.

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[55] Jersey Court of Appeal, 25 September 1985.

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