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Not the beginning of the end: The tension between pure testamentary freedom and self-imposed moral restrictions, a case for formalising limitations

Introduction

In 2017 the Supreme Court confirmed that Heather Ilott should be awarded a share in her late mother's estate as it had been determined that her mother failed to make reasonable financial provision for her.[1] In itself, the outcome of this case seems innocuous. However, the facts raised concerns about the level of judicial interference with freedom of testation that would be deemed to be acceptable. The District Judge, who heard this matter in the first instance, was quoted as saying that 'the rejection by the mother of her only child was unreasonable and that this has led her unreasonably to exclude her daughter from her will despite her needy circumstances'.[2] It is not atypical for a family to be in dispute or that the reasons for the fall out to appear minor to outsiders. Furthermore, as adults, we make choices every day that affect our trajectory in life. Having made those choices it is for the individual to take responsibility for the consequences of their actions, even if this does result in 'neediness'. In those circumstances, and where an individual's express wishes are overturned, it is difficult to rationalise interference with the testator's decision making process.

Conversely, Geoffrey Myers[3] (deceased) disinherited his daughter from his first marriage on the basis that he had provided for her during his lifetime. The facts of this

[1] *Ilott v The Blue Cross and Others* [2017] UKSC 17.
[2] *Ilott v Mitson* [2009] EWHC 3114 (Fam) 60.
[3] *Myers v Myers* [2004] EWHC 1944 (Fam)

case suggest that the deceased had refused to pay for his daughter's education beyond A Levels. It was contended that the deceased's view of women were old fashioned, to the extent that he had offered to pay for his daughter to attend cookery classes so that she could keep a home. He had suggested that his daughter should make her own way in life or find a husband to keep her. Despite his express wishes not to provide for her upon his death, the court determined that she should be awarded a share of his estate. In this instance, it is perhaps easier to justify the interference with testamentary freedom to prevent a testator acting capriciously.

It is difficult to know where the balance lies between enabling a testator to exercise their own judgement and protecting a beneficiary from a capricious testator. High suggests that 'Although the policies of freedom of testation and enforcement of support obligations are not mutually exclusive, it is difficult to satisfy both policies within a single statutory scheme'.[4] As an individual during your lifetime, provided you have mental capacity, you are free to make decisions relating to your property in whatever manner you see fit, even if they appear to be unwise to a third party,[5] so why not on death?

Testamentary freedom is the ability of an individual to distribute their estate upon death in whatever way they desire.[6] It is said that within English succession law, pure testamentary freedom, as accorded by the Mortmain and Charitable Uses Act 1891, was effectively enjoyed until the enactment of the Inheritance (Provision for Family) Act 1938.

[4] ET High, 'The Tension between Testamentary Freedom and Parental Support Obligations: A Comparison between the United States and Great Britain' (1984) 17(2) *CILJ* 321 p 321.
[5] Mental Capacity Act 2005, s 1(4)
[6] Law Commission *Making a Will* (Law Com No 231, 2017) para 1.12.

The testator therefore has a choice to make; to exercise their testamentary freedom and risk this being revoked, or act cautiously and go against their strong beliefs of how their estate should be distributed upon their death. In such circumstances it is contended that a form of forced heirship would be appropriate to provide clarity as to what proportion the testator can distribute (with a guarantee that this decision will be respected), whilst acknowledging those that ought to be provided for.

This paper will explore the justifications for the erosion of pure testamentary freedom from the perspective of the judiciary,[7] legislature[8] and societal views of inheritance, contending that the testator has never truly been free to dispose of his estate in whatever manner he thinks fit. It will draw from the Scottish system of legitim to critique the English approach and suggest that a form of forced heirship should be considered so as to bring clarity when estate planning. It is noted that the current legislation needs to adapt to modern society, as it had done in 1938 and 1975, however, it is also acknowledged that societal attitudes to inheritance (or rather disinheritance) may need to change so as to embrace the notion of forced heirship.

The fallacy of testamentary freedom

Brief Historical Background

In the medieval period there was a distinction between moveable and immoveable property. As such, for immoveable property, there was a prohibition in the freedom of devolution upon death.[9] From a historical perspective, there have been limitations of

[7] See *Ilott v Mitson* [2009] EWHC 3114 (Fam).

[8] See Inheritance (Family Provision) Act 1938; Inheritance (Provision for Family and Dependants) Act 1975 as amended by Law Reform (Succession) Act 1995), s 2.

[9] J Dainow 'Limitations on Testamentary Freedom in England' (1939-1940) 25 *CLQ* 337 p 340.

how a testator could dispose of his assets, be it land or chattels. For example, primogeniture, rights relating to birth rights, common law's failure to acknowledge chattels and gender based restrictions (such as coveture).[10] In addition, there was a period where '… the jurisdiction over wills of personalty had passed to the ecclesiastical courts'.[11] The significance of this was that testators, wishing for safe passage to heaven, were likely to leave their final one third share of their chattels to the Church. Therefore, through the fear of the afterlife, testators would impose their own limitations in relation to the manner in which they exercised their testamentary freedom. As such, it is contended that the freedom to dispose of chattels in that period was not fully utilised.

Given that testamentary freedom is said to be a fundamental right in English law, the above provides a useful insight, and serves as a reminder that pure testamentary freedom was not the starting point.

The Modern Approach

McMurray suggests that a number of statutes, such as the Statute of Uses 1540, contributed to the principle of absolute liberty of testation.[12] There were a number of justifications for the adoption of this Statute. Of particular significance for this discussion, was the protection of the beneficiary, whose equitable interests were disregarded by the common law. Although the Act focussed on inter vivos dispositions, 'the success [of the Statute] … is considered to include the increased dispositive

[10] See OK McMurray 'Liberty of Testation and Some Modern Limitations Thereon' (1919-1920) 14 *ILR* 96 p 106; and J Dainow 'Limitations on Testamentary Freedom in England' (1939-1940) 25 *CLQ* 337, p 339. Noting that coveture is the l egal doctrine where, upon marriage, a woman's legal rights and obligations were subsumed by those of her husband in accordance with the wife's legal status as feme covert.
[11] GW Keeton and LCB Gowertt 'Freedom of Testation in English Law' (1934) *ILR* 326 p 338.
[12] OK McMurray 'Liberty of Testation and Some Modern Limitations Thereon' (1919-1920) 14 *ILR* 96, p 110.

power of landowners',[13] as it provided owners with a greater ability to dispose of their land as they saw fit. However, it is the Mortmain and Charitable Uses Act 1891 that is hailed as the turning point as regards absolute testamentary freedom. Section 7 of the Act has been interpreted as having the effect of removing the restrictions on testamentary gifting, and thus enabling the free distribution of an estate by the testator upon death.

The 1938 Act

The concept of pure testamentary freedom continued until the introduction of the Inheritance (Family Provision) Act 1938. As observed by Harman J in *Re Makein*, this Act 'was the first modern statutory interference in England with the freedom of testamentary disposition before 1938 a man, might by his will, disinherit his whole family'.[14] Furthermore, Sir William Vernon Harcourt, when introducing a bill for the imposition of death duties in Parliament, commented that 'the right of a dead hand to dispose of property - is a pure creation of the law, and the State has the right to prescribe the conditions and the limitations under which that power shall be exercised'.[15] It is therefore prudent to analyse the justification for limiting testamentary freedom.

There had been previous attempts to debate the issue of limiting such freedom in Parliament,[16] which were talked out due to the perceived number of cases that it would apply to, that being so negligible that it was not worthy of due consideration.[17] However,

[13] DT Smith 'The Statute of Uses: A Look at its Historical Evolution and Demise' (1966-1967) 18 *WRLR* 40 p 59.
[14] *Re Makein* [1955] Ch 194, 208.
[15] OK McMurray 'Liberty of Testation and Some Modern Limitations Thereon' (1919-1920) 14 *ILR* 96, p 99.
[16] In 1931 and again in 1934.
[17] *Inheritance (Family Provision) Bill* HC Deb, vol 319, col 512, 22 January 1937.

in 1937, Windsor[18] requested that the Inheritance (Family Provision) Bill be heard through a private members bill, on the same basis as those previously considered. The justification being that, although the number of cases affected may be minimal, it is the duty of society to protect the vulnerable.[19] In particular, it would be paramount and in the interests of justice to prevent an unscrupulous husband from disinheriting his wife and/or children. During the Parliamentary debate, those who supported the bill, and were in favour of curtailing freedom of testation, championed it as the protector of women and children against a callous testator. The effect of the bill, it was envisaged, would be to provide equality between men and women. Whether in fact there has been an improvement is debatable, however, it certainly has changed the landscape of the law of succession.

Nevertheless, there was strong opposition to the introduction of the bill on the basis that it restricted the testator's liberty of testation. In particular, Archibald argued that the bill 'restrict[ed] individual liberty, and what … [was] much more important, it invade[d] the privacy and the personal affairs of the family'.[20] Examples were provided in the House of Commons of cases where, if the bill were to proceed, it would force the testator to dispose of his estate in favour of an undeserving beneficiary.[21] Where a testator is of sound mind and has not acted capriciously, it is difficult to rationalise the interference with those decisions. There were also concerns raised during the debate that such provisions would encourage idleness in those set to receive an inheritance. The suggestion being that if you are not guaranteed an inheritance, you are more likely to act appropriately and work hard to ensure that you were favoured.

[18] An MP whose constituencies included Bethnal Green North East and Kingston upon Hull Central.
[19] *Inheritance (Family Provision) Bill* HC Deb, vol 319, col 512, 22 January 1937.
[20] *Inheritance (Family Provision) Bill* HC Deb, vol 328, col 1291, 05 November 1937 col 1332.
[21] *Inheritance (Family Provision) Bill* HC Deb, vol 328, col 1291, 05 November 1937, cc 1298-1299.

There was also widespread thought, as noted by Crane, that the 1938 Act was passed due to 'exceptional hard case[s]',[22] and that the general proposition was that families were loyal to each other and thus made reasonable provision for one another.

The notion of families providing for themselves is reflected in the minutes of proceedings of the Inheritance (Family Provision) Bill, which was discussed by Standing Committee B on 23 November 1937. There was a significant emphasis on discussing the criteria for those who would be entitled to make a claim under the proposed Act, and what such persons would be entitled to inherit from the deceased's estate. It was determined that those eligible to make a claim should be restricted to spouses, unmarried daughters, an infant son or a son who is suffering from a disability.[23] Arguably, such persons were reliant upon the testator during his lifetime and would have encountered difficulties in maintaining themselves upon the testator's death. The suggestion therefore being that the testator would be morally obliged to provide financial support to those categories of persons so that they did not become destitute following his death, and as a consequence reliant on the state for assistance.

In light of the above discussion it is arguable that 'The [1938] Act rather confirms and adds its weight to developments which had begun before 1938 and which may have contributed to the passing of [the] statute'.[24] It is reasonable to conclude that the erosion of pure testamentary freedom had commenced in advance of the 1938 Act, but that the Act reflected the feelings and decisions made within society at that time.

[22] FR Crane 'Family Provision on Death in English Law' (1960) 35 *NYULR* 984 p 986.
[23] *Inheritance (Provision For Family And Dependants) Bill* HC Deb, vol 895, col 1681, 16 July 1975.
[24] J Unger 'The Inheritance Act and the Family' (1942-1943) 6 *MLR* 208 p 224.

The 1975 Act

Limitations to testamentary freedom continued with the introduction of the Inheritance (Provision for Family and Dependants) Act 1975, which extended the categories of those who would be eligible to claim against a deceased's estate for lack of reasonable financial provision. Prior to the enactment of this statute, the Law Commission Report[25] of 1974 paid particular attention to the spouse, whereby existing legislation[26] was referred to, to propose that the court be given extensive powers to place the surviving spouse (and children) in the same position they would have been in had they divorced the testator.[27] The powers and considerations that the court would have regard to would be aligned to those deliberated upon when determining the division of assets upon financial settlement.[28] In relation to children, the proposal was that a 'child treated as a child of the family should also be entitled to make a claim'[29] and that the age limit should be removed so as to enable the court to exercise their discretion in determining 'which child is or is not deserving, given the circumstances'.[30] When referring to the extension of such provisions, the Law Commission recognised that the 1938 Act already provided for those that the testator is said to have been legally required to provide for, but that the extensions proposed would include those that the testator had a moral obligation to maintain.[31]

[25] Law Commission, *Second Report on Family Property: Family Provision on Death* (Law Comm No 61, 1974).
[26] Matrimonial Causes Act 1973.
[27] Law Commission, *Second Report on Family Property: Family Provision on Death* (Law Comm No 61, 1974), pp 16-17.
[28] Matrimonial Causes Act 1973, s 25(1).
[29] Law Commission, *Second Report on Family Property: Family Provision on Death* (Law Comm No 61, 1974), p 69.
[30] Law Commission, *Second Report on Family Property: Family Provision on Death* (Law Comm No 61, 1974), p 75.
[31] Law Commission, *Second Report on Family Property: Family Provision on Death* (Law Comm No 61, 1974), p 89.

Within the Law Commission Report, reference was also made to the fact that '… an order for family provision would be doing for the deceased what he might reasonably be assumed to have wished to do himself'.[32] However, given that the Parliamentary debates regarding the 1938 Act which refer to there being a negligible number of cases and the need to protect the family in hard cases, it is difficult to see the benefit of governing an issue that is already dealt with by natural love and affection. The Report suggests that the 1975 Act allows for any class of persons who had been maintained (wholly or in part) by the testator immediately before death to seek reparation from the estate. This inevitably increases the scope of those eligible to make a claim, and therefore indirectly limits the freedom with which the testator has to dispose of his estate in the manner he sees fit.

Lord Simon suggested that the 1975 Act was a codification of the existing law[33] and therefore reflective of the changes in societal attitude for the provision of the family. He referred to the contention that the Act supported the rights of women which arose from the functional division of labour,[34] whereby men would typically be the breadwinner, and would therefore be expected to share in his accumulation of funds in his lifetime as upon death. He further remarked that '… the children do not ask to be brought into the world and their upbringing is necessary for the continuity of society',[35] thus suggesting that for morality's sake, such reform was essential. However, despite the general consensus, Wilberforce L, who was an advocate of liberty of testation, was critical of the effects of such reform, suggesting that the 1975

[32] Law Commission, *Second Report on Family Property: Family Provision on Death* (Law Comm No 61, 1974), p 90.
[33] *Inheritance (Family Provision) Bill* HL Deb, vol 358, col 926, 20 March 1975 Lord Simon of Glaisdale.
[34] *Inheritance (Family Provision) Bill* HL Deb, vol 358, col 926, 20 March 1975 Lord Simon of Glaisdale.
[35] *Inheritance (Family Provision) Bill* HL Deb, vol 358, col 926, 20 March 1975 Lord Simon of Glaisdale.

Act was potentially over-legislation of an issue that curbed testamentary freedom. Lord Wilberforce, asserted that

> If one is concerned with the right of a man to dispose of his property by will there are two main approaches which the law can take. One approach, which is quite a respectable one and which has been our law for many years, is to say, that, on the whole, a man is the best judge of where his property should go.[36]

It is interesting to note that the 1975 Act continued to acknowledge those to whom the testator was obliged to maintain during his lifetime, and confirmed that such persons should therefore be entitled to a share of his estate upon death. For public policy reasons it appears to be a sensible approach, so as to ensure responsibility is taken by individuals in supporting the families that they have created. The concern with regards to the provisions of this Act is that applications by able bodied, financially independent children could also be made, which does not reflect public opinion relating to inheritance (as discussed below).

Erosion Arising from Legislation

It can be argued that the legislation provides recourse to those who feel that they have not been adequately provided for, and therefore is not a direct limitation to freedom of testation. There is no guarantee that a claim will be made, nor confirmation that such a claim will be successful. However, the impact of the legislation is such that if the

[36] *Inheritance (Family Provision) Bill* HL Deb, vol 358, col 926, 20 March 1975 Lord Simon of Glaisdale, col 932.

testator determines that he will not provide for a spouse or child for reasons that are personal to his circumstances, unless he makes provision that is aligned to the legislation there is a real, tangible risk that the distribution of his estate will not reflect his wishes. This is supported by the views of the Law Commission, who, when discussing the impact that the reform to the rules of intestacy would have on will making, commented that 'we do not aim to discourage will-writing (which we consider to be the best way for an individual to direct the distribution of his estate, insofar as that is compatible with family provision legislation)'.[37]

Although in itself the legislation is not a direct limitation to testamentary freedom, it does seem to reflect the position discussed earlier with regards to chattels, where testators felt obligated to leave their one third share to the Church.[38] In this instance, the testator would feel obligated to leave their estate to their spouse and children, irrespective of whether they in fact wanted to. McMurray also argues that 'social opinion has usually prevented testators from employing a too arbitrary exercise of their power'.[39] Conversely, Leslie suggests that 'one has a right to distribute property upon death solely according to the dictates of one's own desires, unfettered by the constraints of society's moral code or the claims of others'.[40]

Perspectives on testamentary freedom

The Importance of Testamentary Freedom

[37] Law Commission, *Second Report on Family Property: Family Provision on Death* (Law Comm No 61, 1974), para A.59.
[38] See discussion above.
[39] OK McMurray 'Liberty of Testation and Some Modern Limitations Thereon' (1919-1920) 14 *ILR* 96, p 118.
[40] MB Leslie 'The Myth of Testamentary Freedom' 38 *ALR* 235 p 235.

In light of the discussion above, it is perhaps prudent to consider what importance society, the legislature and the judiciary have accorded to the principle of testamentary freedom. An analysis of the attitudes toward freedom of testation will enable an informed assessment to be made as to whether it should, in fact, be preserved, or whether it would be more helpful to a testator if they were provided with direction in this regard.

Societal Attitudes to Inheritance

To say that testamentary freedom has ended is perhaps an overstatement. It is more accurate to suggest that testamentary freedom has limitations, in particular, the self-restriction of testators who feel morally obligated to provide for their families. This was alluded to in the case of *Ilott v The Blue Cross and others*[41] where Lord Hughes opined that the limitations imposed by the 1938 Act on those that could make a claim reflected the importance attached to freedom of testation.[42]

The extent to which this continues to be the case can be seen in the approach taken by society to inheritance. In a study commissioned by the Joseph Rowntree Foundation in 2005, Rowlingson and McKay referred to 'Factor analysis [which] suggest[s] that there are some underlying attitudes to inheritance that explain people's attitudes more generally. The main factor is the extent to which people think that some people have a need to inherit'.[43]

[41] [2017] UKSC 17.
[42] [2017] UKSC 17, para 13.
[43] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), p xi.

The needs and the dynamic of the family have changed considerably since the enactment of the 1938 Act. It can be observed that there has been an increase in the number of people with no children, in the number of divorces, re-marriages and step-families, and in the number of lone parenting.[44] The impact of the changing demographic of the family unit is that the testator may feel morally obligated to provide for an increased number of people, who, it is suggested, are in need of an inheritance. Douglas and others comment that

> it remains the case, notwithstanding the massive social changes that we have witnessed, that for inheritance purposes, at least, people view 'family' members as the appropriate group to receive one's property, that membership of this group is quite tightly defined, and that friends are not prioritized over family but may be included in the absence of a created family.[45]

This is supported by Rowlingson and McKay, whose study reported that 'children came top of the list, with 89% of respondents citing their offspring as potential beneficiaries [to their estate]'.[46] The key indication that can be taken from this study is that testators favour their family over others when distributing their estate. Whether this attitude is a true reflection of the testator's wishes, or alternatively what he feels is expected of him, needs further investigation.

[44] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), p 2.
[45] G Douglas and others 'Enduring Love? Attitudes to family and Inheritance Law in England and Wales' (2011) 38(2) *JLS* 245, p 256.
[46] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), p 48.

Douglas and others argue that 'decisions about inheritance require people to reflect who in their lives is of most importance to them and represent a material, concrete expression of their sense of love and obligation'.[47] The premise being that testators will naturally want to provide for their kin upon death, either through a sense of a moral obligation to do so, or because of their love and affection for their offspring. When determining the distribution of their estate, it is said that the testator will consider a number of factors. These include; sharing and commitment,[48] which relates to the testator's expression of love and affection for the beneficiary which is reciprocal; dependency and support,[49] which stems from the testator's sense of duty and the need to ensure that the beneficiary is able to continue to live in the lifestyle they have become accustomed to; and blood-tie and lineage,[50] which relates to the obligations towards the biological family. All of which demonstrate the sense of obligation that the testator feels they have towards potential beneficiaries of his estate. In such circumstances, the testator may well be exercising their freedom of disposition, but only to the extent of providing for those that society would expect them to provide for. Finch and Mason thus '… suggest that the principle of testamentary freedom in English law is supportive of this kind of kinship, because it enables testators to decide how to dispose of their property'.[51] Ultimately, the current system provides the testator with a choice perhaps adding weight to the argument that testators are still able to exercise freedom of testation.

[47] G Douglas and others 'Enduring Love? Attitudes to family and Inheritance Law in England and Wales' (2011) 38(2) *JLS* 245, p 246.
[48] G Douglas and others 'Enduring Love? Attitudes to family and Inheritance Law in England and Wales' (2011) 38(2) *JLS* 245, p 263.
[49] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005).
[50] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005).
[51] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), p 270.

Here it is argued that the testator is best placed to determine what is in their family's best interests and therefore that they should be the one to determine how the estate is distributed on death. For example, where a child has given up their home to move in with the testator to care for him in his old age, the testator can apportion the value of his estate accordingly so as to create parity amongst issue.[52] It is difficult to see how third parties, such as the judiciary, can empathise with the intentions of the deceased in such private matters. However, great significance has been placed on the obligations of the testator to provide for his offspring. Harman LJ, commented in the case of *Re Joslin*,[53]

> … a testator is not only entitled, but is bound, to consider how far there lies a duty on him - (it may be a moral duty) - to make provision for the children whom he has brought into this world and the woman who has borne those children.[54]

It can therefore be construed that testators are free to exercise freedom of testation, so long as they provide for their spouse and issue. This is evidently not reflective of the pure testamentary freedom that English law boasts as a fundamental right.

Attitudes towards receiving an inheritance further corroborate the judicial approach to disposition of an estate. It is considered that '… blood tie remains an important factor influencing people's opinions on who should inherit …',[55] and 'Most (90%) of those

[52] DB Kelly 'Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications' (2013) 82 *FLR* 1125 p 1127.
[53] [1941] Ch 200.
[54] *Re Makein* [1955] Ch 194, para 206.
[55] G Douglas and others 'Enduring Love? Attitudes to family and Inheritance Law in England and Wales' (2011) 38(2) *JLS* 245, p 268.

who expect to receive something think that they will receive an inheritance from their parents …'[56] It is also suggested that the decision relating to whether or not a person will receive an inheritance is based on needs.[57] The premise being that the younger the potential beneficiary is, the more in need they will be. The same report demonstrated that, 'There was a general agreement among all age groups that young people needed help initially to establish themselves but then had to sort out their own problems after a certain age'.[58] The cut-off point at which this moral obligation ceases to apply appears to be for a financially independent adult child. This understanding is supported in the earlier case of *Espinosa v Bourke*,[59] where Butler-Sloss LJ stated that 'If the applicant is of working age, with a job or capable of obtaining a job which would be available, the factors in favour of his claim may not be of much weight in the scales'.[60]

Despite the fact that studies have demonstrated that children do expect to receive something from their parents' estate, there is common thought that a child should not in fact expect anything, as an inheritance is not received as of right. Rowlingson and McKay believe that this viewpoint '… reflects the principles of testamentary freedom enshrined in English law … that people have no automatic rights to the estates of their relatives'.[61]

In *Re Makein*, Harman LJ makes further comment with regards to the testator's moral obligations towards his family, suggesting that '… while a man is free to honour his

[56] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), p x.
[57] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), p xi.
[58] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), p 13.
[59] [1999] 1 FLR 747.
[60] *Espinosa v Bourke* [1999] 1 FLR 747, 755.
[61] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), p 6.

moral obligations, it may be said the law is going quite far enough in compelling him to honour his legal obligations … and that to extend the obligation is no part of the duty of society or the policy of the law'.[62] Therefore, despite common thought that a testator will naturally prioritise his family, the ultimate decision as to how an estate is distributed firmly rests with the testator. If the testator feels morally obligated to provide for others, then that continues to reflect his free will, as he has selected to take heed of such obligations. Irrespective of whether the testator wishes to give credence to this obligation, Butler-Sloss LJ in *Re Hancock*[63] confirmed that the court ought to give weight to the factors considered by the testator in determining how best to distribute his estate.

In light of the above discussion, it could be argued that limitations to freedom of testation do exist, however, such limitations appear to be self-imposed by the testator. There have been previous considerations to introducing forced heirship, akin to that found in Scotland. It would appear at first instance that forced heirship would eradicate confusion and litigation from disappointed beneficiaries, and would formalise the self-imposed limitations. Arguably, a move to forced heirship would continue to reflect current societal attitudes. However, despite the Law Commission drawing from experiences in the Scottish legal system to consider whether a hybrid[64] approach to freedom of testation would be suitable, it has always been dismissed. This is perhaps due to the perceived consequences of such action, which could lead to laziness and idleness amongst those set to inherit.[65] Furthermore, where children are financially

[62] *Re Makein* [1955] Ch 194, para 208.
[63] [1998] 2 FLR 346, see also para 14
[64] The approach within the Scottish legal system is to dictate the distribution of moveables, but allow for pure testamentary freedom for immoveables. This approach is described and discussion in more depth in the following section.
[65] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), p 15.

supported beyond what is deemed to be necessary, it could also lead to a lack of self-reliance.[66] This is also reflected in Rowlingson and McKay's study, which reported that '… 86% of the public agree that: People should be financially independent of their parents'.[67]

Judicial Interpretation of Testamentary Freedom

Judicial interpretation has, in the main, acknowledged the importance of testamentary freedom, and has emphasised that for an independent adult child it is unlikely that a court would interfere with the decision made by the testator. Specifically, Oliver J opined in *Re Coventry*[68] that '… applications under the [Inheritance (Provision for Family and Dependants)] Act of 1975 for maintenance by able-bodied and comparatively young men in employment and able to maintain themselves must be relatively rare and need to be approached … with a degree of circumspection'.[69] However, the later Court of Appeal judgment in *Ilott v Mitson*[70] - decided nearly thirty years after *Re Coventry* - caused significant controversy due to the impact it would have on a testator's ability to exercise their freedom of testation. It has been predicted that the effect of this judgment will be to open the floodgates to underserving children who are financially independent, but are aggrieved that their parent did not see fit to provide an inheritance for them.[71] This is contrary to public opinion, which suggests that adult children should not be financially dependent on their parents.[72] Contrary still

[66] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), p 14. See also DB Kelly 'Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications' (2013) 82 *FLR* 1125 p 1127, p 1127.
[67] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), p 14.
[68] [1980] Ch 461.
[69] [1980] Ch 461, 465.
[70] [2011] EWCA Civ 346.
[71] See, for example, M Kennedy *Daughter wins fight to overturn mother's will* (2011), available at https://www.theguardian.com/law/2011/mar/31/woman-appeal-mothers-will-animal-charities
[72] K Rowlingson and S McKay *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005) p 14.

to that standpoint, and despite there being public opinion that testators should not be forced to provide for any particular person upon their death, there is also widespread belief that 'showing one's love and doing the right thing, ultimately, underpin people's views on how property should be passed …'[73] Indeed, it is clear that testators often feel a moral obligation to ensure that their nearest kin are supported during their lifetime, as well as on their death.

Nevertheless, the judiciary continue to support the notion of testamentary freedom. In *Re Coventry*, Oliver J confirmed that 'the court has no carte blanche to reform the deceased's dispositions…to accord with what the court itself might have thought would be sensible if it had been in the deceased's position'.[74] This was supported in the case of *Negus*[75], where it was stated that '… the court is not in the business of rewriting wills to give people legacies or bequests'.[76] Evans also argues that '… on the face of it, a testator's wishes ought to command an important level of respect, and unless there are exceptional reasons should be implemented carefully'.[77]

Although there has been judicial support for the retention of testamentary freedom, the case of *Ilott v Mitson*[78] suggests that the courts have taken a new approach. In this well documented case, a mother had prepared a will, leaving her estate to a number of charities, and deliberately excluded her adult daughter. There were several instances where the mother confirmed that she understood that she had not provided

[73] G Douglas and others 'Enduring Love? Attitudes to family and Inheritance Law in England and Wales' (2011) 38(2) *JLS* 245 p 247.
[74] *Re Coventry*, above n 6, para 475.
[75] *Negus v Bahouse* [2007] EWCH 2628 (Ch)
[76] [2007] EWCH 2628 (Ch), para 8.
[77] S Evans 'Mountain or Molehill?' (2016) 166 *NLJ* 686 p 483.
[78] [2009] EWHC 3114 (Fam).

for her daughter, and one of the reasons cited was that of estrangement between the parties. The daughter, although of low income and means, was financially independent of her mother. At first instance the Court determined that the mother had not made reasonable financial provision. As a result, the Court awarded the daughter a share in her mother's estate. On appeal from this decision,[79] the charities sought to argue that the Court had incorrectly 'diminished the respect that ought to be accorded to testamentary freedom and introduced an undesirable element of uncertainty …'[80] It was acknowledged that the 1975 Act did not undermine a person's ability to dispose of his estate in whatever manner he saw fit. Furthermore, Mrs Justice King, hearing the appeal, confirmed that a claimant need not demonstrate that the deceased owed a moral obligation to them and 'necessitous circumstances cannot in themselves be a reason to alter the testator's dispositions'.[81] Nevertheless the claimant's earning capacity and the express exclusion from the will were significant factors which led to an award in favour of the daughter, which effectively undermined the carefully thought out wishes of the testatrix. The effect of this judgment (which was confirmed by the Supreme Court in 2017) is that a testator who has carefully and thoughtfully prepared a will to take into account their personal circumstances is therefore not guaranteed that their wishes will be effective on their death.

The ratio in the *Ilott* case imposes an additional limitation on testamentary freedom. The testator is now also required to consider a child's impecuniosity before determining how to distribute their estate. The conclusion reached in this case could perhaps be as a result of the wide discretion afforded to the judiciary in considering

[79] *Ilott v Mitson* [2011] EWCA Civ 346.
[80] *Ilott v Mitson* [2011] EWCA Civ 346, para 71.
[81] *Ilott v Mitson* [2011] EWCA Civ 346, para 49.

'… the financial resources and the financial needs of the applicant now and in the foreseeable future…'[82] which is contained within s 3(1) of the 1975 Act.

This consideration was alluded to in the earlier case of *Re Hancock*, where Judge LJ suggested that

> … while accepting that a claim by an adult with an established earning capacity may very well fail if a moral claim or special circumstance cannot be established, in an appropriate case the court is entitled to conclude that the claim should succeed notwithstanding their absence.[83]

It was never envisaged that the 1975 Act would enable the court to re-write a testator's will, however, it is argued that it reflected existing family legislation. This is supported by an American review undertaken by Leslie[84] where it was found that freedom of testation has weakened through the judiciary's prioritisation of the testator's family over such freedom. In this review, Leslie argues that the judiciary are more inclined to impose moral obligations upon the testator to distribute the estate in accordance with social norms by providing for dependants. This is perhaps exemplified in the comments made by Hughes L in *Ilott v The Blue Cross and Others*,[85] where he opined that there is a public interest consideration in ensuring that 'family members discharg[e] their responsibilities towards one another so that these do not fall upon the state'.[86]

[82] *Re Coventry* [1980] Ch 461, para 8.
[83] *Re Hancock* 1998] 2 FLR 346, para 7.
[84] MB Leslie 'The Myth of Testamentary Freedom' 38 *ALR* 235, p 236.
[85] [2015] UKSC 17.
[86] *Ilott v The Blue Cross and others* [2015] UKSC 17, para 63.

These comments perhaps reflect the current economic climate, whereby a greater number of people are living in relative poverty.

The analysis undertaken suggests that society and the judiciary, in principle, continue to support testamentary freedom. However, the reality appears to be that the testator is bound to follow societal views of what is fair and reasonable. The notion of fair and reasonable would include provision for those that are dependent upon the testator, as well as provision for those that would otherwise seek assistance from the state.

If society imposes an obligation on the testator to provide for their dependants and family more generally, perhaps the English system of succession should be reconsidered to codify societal views and attitudes as was the case with the 1938 and 1975 Acts.

Looking forward to a new succession

The Case for Forced Heirship

In the Supreme Court decision in *Ilott* Lady Hale quoted Albery from his work, The Inheritance (Family Provision) Act 1938,[87] in which he stated that

> 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.[88]

[87] Sweet & Maxwell, 1950.
[88] *Ilott v Blue Cross & Others* [2017] UKSC 17, para 50.

As referred to previously, Lady Hale has emphasised that it is a matter of public policy 'in family members discharging their responsibilities towards one another so that these do not fall upon the state',[89] and according to Colman, it therefore appears that '... an Englishman ... may still exercise testamentary freedom (in the absence of actual dependants)',[90] a premise referred to previously in this paper.

Given that the judiciary have seemingly accepted that there are justifications for curtailing testamentary freedom; that it has become increasingly difficult to advise a client on how best to protect their wishes on death; and given the ever changing family dynamics and views of inheritance, it is perhaps time that forced heirship be given a fair hearing.

Compared to the civil law based societies within Continental Europe, it appears that England is an anomaly; and whilst England made the conscious decision to shift to pure testamentary freedom, our closest neighbours, Scotland, made the conscious decision to retain the civilian rules of legitim.[91]

The Scottish Law of Succession

The historical development of succession within Scotland closely reflected the position within England. As Reid notes, 'For much of its history, succession law in Scotland

[89] *Ilott v Blue Cross & Others* [2017] UKSC 17, para 63.
[90] P Colman 'What Ilott v Mitson means for testamentary freedom' (2015) available at https://www.wrigleys.co.uk/news/professional-advisers/what-ilott-v-mitson-means-for-testamentary-freedom/
[91] DL Carey Miller 'Rights of the Surviving Spouse: A Distinct System in Scotland and Developments in England' (1980) *AJ* 49 pp 55-56.

treated moveable and immoveable property separately and differently'.[92] The doctrine of jus mariti applied whereby the wife's moveable property was subsumed within her husband's upon marriage, which has similarities with the concept of coveture in England.[93] In 1881, although the position changed so that jus mariti no longer applied, restrictions on the disposition of moveables were still imposed through jus relicate.[94] Furthermore, whilst the distribution of immoveables in England were dealt with by way of primogeniture, in Scotland, terce and courtsey applied, whereby the surviving spouse would be entitled to the deceased's one third share of the immoveable estate.[95] Historically, therefore, it appears that the starting point was similar in both countries, and pure freedom of testation was not a fundamental feature of succession.

The current position in Scotland is that a testator cannot disinherit their spouse, civil partner or children.[96] Therefore, provided that such persons survive the deceased, they will have legal rights to the moveable estate which vests in them by 'force of law'.[97] Such rights are in the form of legal rights in relation to the surviving spouse or civil partner and legitim with regards to children.

The concept of legal rights derives 'from a combination of the common law and the Succession (Scotland) Act 1964'.[98] It entitles a surviving spouse/civil partner to a one

[92] K Reid 'Testamentary Formalities in Scotland' (2010) Edinburgh Research Explorer Working Paper Series No 2010/33 available at http://www.research.ed.ac.uk/portal/files/13522923/Reid_Testamentary_Formalities.pdf
[93] DL Carey Miller 'Rights of the Surviving Spouse: A Distinct System in Scotland and Developments in England' (1980) *AJ* 49, p 49.
[94] DL Carey Miller 'Rights of the Surviving Spouse: A Distinct System in Scotland and Developments in England' (1980) *AJ* 49, p 51. Jus relicate is the surviving spouse's right to a share of the deceased's moveable estate.
[95] Both terce and courtesy were abolished by the Succession (Scotland) Act 1964, s 10(1).
[96] S Harvie-Clark, 'Inheritance law in Scotland' (SPICe, 2015).
[97] HM Revenue & Customs 'Inheritance Tax Manual' (2017) available at https://www.gov.uk/hmrc-internal-manuals/inheritance-tax-manual/ihtm12221
[98] Unknown 'Ilott and Mitson: testamentary freedom' (2015) *SPCLR* 2.

third share of the testator's moveable estate if there are issue, or to one half if there are no issue.[99] The Scottish Law Commission suggested that the purpose of retaining legal rights was to ensure that the surviving spouse/civil partner were not left destitute upon the testator's death.[100] Legitim is 'the [child's] right to a sum of money calculated on the basis of the value of the deceased's net moveable estate, irrespective of the provisions of the deceased's will'.[101] The value of such a share is in accordance with the value that can be expected by a surviving spouse or civil partner (one third share where there is a spouse/civil partner, or one half where there is not).[102] Reid argues that legitim is an acknowledgment of the parent-child relationship rather than based on the needs of that child. She argues that inheritance 'touches both material and sentimental interests and the acquisition of a loved one's property may have a deeper symbolic function for close relatives which impacts on the continuity of relationships, memory and even personal identity'.[103] Nevertheless, the effect of legal rights and legitim is that where a testator has made an attempt to disinherit their surviving spouse/civil partner or children, the disappointed beneficiary can elect to exercise their rights (within a period of 20 years after the date of death) and take a share of the deceased's estate, thus contradicting the testator's wishes and curtailing their freedom of testation.

The Scottish Consumer Council suggests that over the last 40 years there has been little change to the development of the Scottish law of succession and it therefore is

[99] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009) p 31.
[100] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009) p 31.
[101] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009) p 31, p 36.
[102] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009) p 31, p 37. In the event that there is more than one issue, all children will take an equal share of the legitim. In addition, where a child has predeceased leaving children of their own, then such child can make representations to take their parent's share, Succession (Scotland) Act 1964, s 10(2).
[103] D Reid 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (2008) *ELR* 391 p 397.

no longer reflective of the changes to family structures.[104] Such changes to the family dynamics are reflective of those experienced within England.

Disparity in Attitudes to Inheritance

Thus far, the two countries seem to be aligned in terms of historical development and demographic. However, disparity between the two systems is apparent within public attitude towards freedom of testation. Whereas it has been hailed as being a fundamental principle in English law, this does not appear to be the case within Scotland.

In Scotland, there seems to be strong public opinion that an individual should be protected against disinheritance, and that there are certain classes of persons, namely the surviving spouse, civil partner or children, whom a testator is morally obliged to provide for upon death. There is also a suggestion that such persons have a moral right to inherit.[105] It therefore appears that in Scotland a greater emphasis is placed on fulfilling your moral and legal duty, which is considered to be paramount and is of primary concern when compared to the testator's freedom of testation. The retention of the notion of forced heirship has been attributed to 'the strong position which the familia occupied in Roman civilisation as a social unit',[106] and this is supported by Reid, who states that the 'preservation of that rule, several centuries after it had been abandoned in England, was attributed to "respect to the Roman law and the feudal

[104] See Scottish Consumer Council 'Wills and Awareness of Inheritance Rights in Scotland' (SCC 2006).
[105] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009), p 31.
[106] JC Gardener 'The Origin and Nature of the Legal Rights of Spouses and Children in the Scottish Law of Succession' (1927) 39 *JR* 209 p 212.

notions", in that order'.[107] Furthermore, legitim has been considered to be a fundamental principle of Scottish law, which has been preserved due to tradition.[108] The retention of legal rights and legitim could also be attributed to the notion of aliment, whereby the testator is required to maintain their spouse and issue during their lifetime. It could therefore be argued that if there is a requirement to maintain such persons during the testator's lifetime, then such obligation should be extended to include the same upon death.[109] The ideology of maintaining one's family is also present in English law, an example of which can be seen in the case of *Bennett v Bennett* where Jessel MR stated that '… the father is under an obligation … from the mere fact of his being the father …'[110] Although there have been attempts to abolish this archaic ideal in English law by virtue of s 198 of the Equality Act 2010, it should be noted that it is prospective only and has yet to come into force. This demonstrates the opinion that in England, as in Scotland, testators are morally obligated to provide for their spouse and issue. Given this perspective, it may not be so controversial to introduce legitim in English succession law.

The obligation of aliment ceases upon the child attaining the age of 25, and there are competing views on whether an adult child should be entitled as of right to the estate of their parent.[111] On the one hand, a child of the family will always be considered as such, irrespective of age. Therefore, the parent-child relationship has been considered as a no exit relationship whereby neither the parent nor child can divorce themselves

[107] K Reid 'Testamentary Formalities in Scotland' (2010) Edinburgh Research Explorer Working Paper Series No 2010/33 available at http://www.research.ed.ac.uk/portal/files/13522923/Reid_Testamentary_Formalities.pdf, p 4.
[108] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009), p 38.
[109] P Wheelhouse 'Consultation on the Law of Succession' (Scottish Government 2015).
[110] (1879) 10 Ch D 474 paras 447-478.
[111] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009), pp 39-40.

from their obligations towards one another; and where such obligations may be unspoken or taken for granted.[112] This is in contrast to a marriage, where the parties may select to divorce and therefore divide their finances inter vivos. On the other hand, there is no legal basis for a child to enforce such moral obligations against their parent inter vivos, and to enable them to do so upon death would be a step too far.[113] It has also been argued that we are an aging population. Therefore, at the point that a parent dies, their children are much older, and therefore are less likely to need an inheritance to provide them with financial security for the future.[114]

From an English perspective, although the case of *Ilott v Mitson* awarded an adult child a share of her mother's estate, this was qualified by her impecuniosity. Had the daughter of the deceased been of wealthier means, and the residuary beneficiaries had not been charities, the conclusion may well have been different. Nevertheless, public opinion on whether an adult child should inherit as of right 'is particularly subjective and views are influenced by personal circumstances and experience, possibly changing over time'.[115] In light of this, it could be argued that enabling the testator to exercise pure testamentary freedom would take into account such changing attitudes and provide a more flexible approach, particularly given the fact that in England there is judicial discretion to ensure that the proper provision of family members has been made. Reid consequently argues that '… entitlement to a parent's estate must derive either from need or from pre-existing legal obligation'.[116]

[112] D Reid 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (2008) *ELR* 391, p 401.
[113] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009), p 39.
[114] Historic Housing Association for Scotland 'Consultation Response available at file:///H:/LLM/Scotland/HHAS%20-%20Succession%20Consultation%20Response%20Sept%202015.pdf.
[115] P Wheelhouse 'Consultation on the Law of Succession' (Scottish Government 2015), p 23.
[116] D Reid 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (2008) *ELR* 391, p 319.

Scottish Reform Proposals

Given public support for the protection from disinheritance; the obligations of aliment; and the substantial number of people who strongly believe that children should be entitled to a share of their parent's estate upon death, it is thought that 'complete freedom to test ie to dispose of one's estate by will is not a viable option…' [117] in Scotland is not desirable. This view is supported by Reid, who highlights that 'the evidence from opinion surveys suggests that Scots do not support unfettered freedom of testation'.[118] In their most recent reform to the law of succession,[119] Scotland determined to not only retain a fixed share for spouses/civil partners and children, but to extend it to both moveable and immoveable property. The proposals regarding protection from disinheritance proved to be controversial and were therefore not adopted in the Succession (Scotland) Act 1964. The proposal regarding the spouse/civil partner's entitlement was less controversial, and it was accepted that such persons would and should expect an inheritance.[120] However, opinion was divided with regards to the provision for children. The proposal was to remove legitim and replace it with either the provision of financial support to dependent children only for their maintenance, or for a fixed legal share that would apply to children irrespective of their age. The rationale for the former proposal was to provide the testator with greater freedom of testation, as they would be able to take into account the whole set of circumstances applicable to their own family and know that their wishes would not be challenged.[121] However, it was also acknowledged within the Scottish Law Commission's report that this greater freedom would mean that a child who was over

[117] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009), p 31.
[118] D Reid 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (2008) *ELR* 391.
[119] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009).
[120] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009).
[121] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009), p 42.

the age of 25 would no longer be considered as a dependant, and therefore would not be protected from disinheritance.[122] In addition, such children would have no recourse against a testator who had acted capriciously[123] (unlike in England). In terms of the latter proposal, had this been in force in England at the time of *Ilott*, it would have provided confirmation that the daughter would have received a fixed legal share from her mother's estate; her mother would have been able to freely exercise freedom of testation with regards to the balance of her estate, knowing that it could not be challenged; and the charities would have been clear on their entitlement.

In contrast, within English law, the Inheritance (Provision for Family and Dependants) Act 1975 enables a disappointed child to make a claim against their parent's estate no later than six months from the date that the grant of representation is issued (but can be made before the grant is issued).[124] There is then a reliance on judicial discretion to support the testator's wishes, or restrict their freedom of testation. If children were entitled to a fixed legal share in England, a decision would need to be made as to whether the provisions in the 1975 Act should be extinguished so as to ensure that the position of the child is not elevated.

Conclusion

As Gardener highlights,

> Probably the most interesting aspect of early testament is the question as to whether a testator should be permitted to exercise an unrestricted power

[122] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009), p 38.
[123] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009), p 42.
[124] Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(c) and s 4.

> in the disposal of his estate, or whether equity and the state should, in certain circumstances, retain restrictions on complete freedom of testing.[125]

There is a tension between 'striking the appropriate balance between individuals having a freedom to leave their property to whoever they want and giving family some rights to receive an inheritance'.[126] This tension is seen in both the English and Scottish laws of succession, where there is an acknowledgement that the testator should be free to dispose of his assets upon death in whatever manner he sees fit, but that this freedom should be qualified by the moral (and legal in Scotland) obligations to provide for the surviving family. It is also suggested 'that there are legal limits on what testators are free to do with their estates - applied both north and south of the border …'[127] and that within England, the Inheritance (Provision for Family and Dependants) Act 1975 'provides for a qualified form of testamentary freedom'.[128]

It is therefore contended that the current system in England is not reflective of societal attitudes to inheritance and family obligations. As Reid suggests, 'the extent to which a society restricts or encourages freedom of ownership and the accumulation of wealth reflects the values of that society…'[129] The implications of this is that the testator is uncertain that the choices they have made during their lifetime, with regards to private and personal affairs relating to the distribution of their own assets, will be respected upon their death. The impact could be to discourage individuals from preparing wills, whereby the purpose of creating such a document cannot be identified.

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[125] JC Gardener 'The Origin and Nature of the Legal Rights of Spouses and Children in the Scottish Law of Succession' (1927) 39 *JR* 209.
[126] P Wheelhouse 'Consultation on the Law of Succession' (Scottish Government 2015), p 22.
[127] Unknown 'Illott and Mitson: testamentary freedom' (2015) *SPCLR* 2, p 2
[128] Unknown 'Illott and Mitson: testamentary freedom' (2015) *SPCLR* 2.
[129] Unknown 'Illott and Mitson: testamentary freedom' (2015) *SPCLR* 2, p 391.

At times of family disputes, tensions are often running high and decisions are made with emotion. Testators are therefore likely to feel aggrieved to know that a third party (such as the court) could determine that the decisions they have made are incorrect, particularly given the general encouragement for an individual to act autonomously and independently. It is argued that the judiciary are given wide discretion to determine that a testator has not made reasonable financial provision for a child, and the *Ilott* case introduced a further category of beneficiary that ought to be provided for, the question is, how many more categories will be added?

Legislation has often reflected public opinion of what is fair, just and moral. The 1938 and 1975 Acts are an example of legislation codifying societal attitudes at the time. It is clear that public attitudes reflect the need to provide for the family, and that children often presume that they will receive an inheritance from their parents. A form of forced heirship, whereby significant individuals (such as a spouse, civil partner and children) are entitled to a fixed share of the estate, would enable the testator to exercise testamentary freedom in relation to a proportion of their estate. This would provide for greater certainty and clarity to the law of succession. The testator would be assured that their decision of how to distribute a proportion of their estate would be not be questioned, whilst significant others would be comforted by the fact that they cannot be disinherited for capricious reasons. There would also be public policy implications on this form of forced heirship, whereby there could potentially be less reliance on the state, as the child (or significant other) would be provided for, to an extent, from the deceased's estate thus reducing the need for state assistance.

As with the enactment of the 1938 and 1975 Inheritance Acts,[130] rather than forced heirship being a radical proposition, it is perhaps confirmation that it is not 'the beginning of the end of testamentary freedom - [because] freedom to disinherit certain relatives has been limited for some considerable time'.[131] But rather a shift to forced heirship would be a codification of existing attitudes to inheritance. It is proposed that the notion of legitim be extended in Scotland, although there is some opposition, it is contended that the current system is workable. However, in England, until a more formalised approach is taken to the law of succession, the testator will continue to hope that their wishes are respected upon their death, but will die never knowing if in fact they were.

[130] Inheritance (Provision for Family) Act 1938 and Inheritance (Provision for Family and Dependants) Act 1975.
[131] Unknown 'Illott and Mitson: testamentary freedom' (2015) *SPCLR* 2, p 2.