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Edited by
KATHARINA BOELE-WOELKI
JO MILES
JENS M. SCHERPE
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Edited by Katharina Boele-Woelki, Jo Miles and Jens M. Scherpe

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CONTENTS

Preface .............................................................................................................. v
List of authors ................................................................................................. xix

PART ONE – KEYNOTE LECTURE

FINANCIAL CONSEQUENCES OF DIVORCE: ENGLAND VERSUS THE REST OF EUROPE
Mathew Thorpe ................................................................................................. 3
1. Introduction ................................................................................................. 4
2. History ......................................................................................................... 4
3. The problem ............................................................................................... 5
4. Solutions ..................................................................................................... 6
5. Domestic law reform ................................................................................ 8
6. Transfer ..................................................................................................... 9
7. Moore v Moore ........................................................................................... 12
8. Agbaje v Agbaje ........................................................................................ 13
9. Applicable law versus transfer ................................................................ 14
10. Conclusion ............................................................................................... 14

PART TWO – MATRIMONIAL PROPERTY LAW IN EUROPE

MATRIMONIAL PROPERTY LAW IN EUROPE
Walter Pintens ................................................................................................. 19
1. Property relations between spouses: a difference in approach between civil and common law ................................................................. 20
2. Default regime .......................................................................................... 21
   2.1. Community of acquests in the Romanic legal family and in Eastern European legal systems ................................................................. 22
   2.1.1. Composition of the categories of property ..................................... 23
   2.1.2. Administration of assets ................................................................. 25
   2.1.3. Liquidation and distribution .......................................................... 26

Intersentia vii
2.2. Participation systems in the Nordic and Germanic legal systems

2.2.1. Deferred community

2.2.1.1. Nordic legal systems

2.2.1.2. Austria

2.2.2. Statutory compensation clause

2.2.2.1. Germany

2.2.2.2. Switzerland

2.2.2.3. Greece

2.3. Separation of property

2.4. On the way to matrimonial property law and a default regime in the common law?

3. Marital agreements

3.1. Private autonomy

3.2. Form and procedure

3.3. Binding force

4. Comparative perspectives

4.1. Default regimes

4.2. Freedom of contract

4.3. The quest for harmonisation

INITIAL RESULTS OF THE WORK OF THE CEFL IN THE FIELD OF PROPERTY RELATIONS BETWEEN SPOUSES
Katharina Boele-Woelki and Maarit Jäntherä-Jareborg

Introductory remarks

1. Preparatory results

2. The existing European and international legal framework

3. Guiding principles

4. Cross-border relationships

5. Other proposals and the CEFL

6. Crucial choices and considerations

7. Structure

8. Concepts

8.1. Rights and duties

8.2. Community of acquisitions

8.3. Participation in acquisitions

8.4. Marital property agreements

Concluding remarks
PART THREE – FAMILY CONTRACTS – ISSUES OF AUTONOMY

CONTRACTING IN FAMILY LAW: A EUROPEAN PERSPECTIVE

Nina Dethloff ................................................................. 65

1. Introduction ................................................................. 67

2. Party autonomy and the consequences of divorce – Divergence and convergence ................................................................. 70
   2.1. Role of party autonomy in view of the different statutory rules –
       The traditional gap .................................................. 70
   2.2. Marital agreements in recent English case law – Narrowing of
       the gap ................................................................. 72
   2.3. Contractual freedom in Continental European matrimonial
       property law – Preconditions and limits .............................. 74
       2.3.1. Formal requirements ........................................... 74
       2.3.2. Pre- and post-nuptial agreements ............................. 76
       2.3.3. General rules of contract law ................................. 76
       2.3.4. Special provisions in matrimonial law ....................... 79
   2.4. Contractual freedom regarding maintenance and other financial
       consequences of divorce ............................................. 81

3. Autonomy and its boundaries – Perspectives .................................. 84
   3.1. The principle of self-determination .................................. 84
   3.2. The boundaries of contractual freedom .............................. 85
       3.2.1. Their justification .............................................. 85
       3.2.2. The requirement of special provisions ......................... 87
           3.2.2.1. Procedural safeguards ................................. 87
           3.2.2.2. Judicial control ........................................... 89
           3.2.2.3. Criteria for fairness – fundamental principles of
                     statutory rules as yardstick .............................. 90
               3.2.2.3.1. Compensation for marriage-related
                     economic disparities ........................................... 90
               3.2.2.3.2. Consequences for party autonomy ............ 91
                   3.2.2.3.2.1. Limits on waiving
                     compensation for marriage-related detrims ... 91
                   3.2.2.3.2.2. Consideration of the overall
                     financial consequences .............................. 93

4. Conclusion ................................................................. 94

Intersentia ix
MARITAL PROPERTY AGREEMENTS AND THE WORK OF THE LAW COMMISSION FOR ENGLAND AND WALES

ELIZABETH COOKE ........................................................................... 95

1. Introduction ................................................................. 96
2. The Law Commission’s project on marital property agreements ........ 97
3. The current law ......................................................... 98
   3.1. Separation of property during marriage ...................... 98
   3.2. The law of ancillary relief ........................................ 98
4. Marital property agreements: The current law in England and Wales . 102
5. Marital property agreements: The options for reform .................... 103
   5.1. A small step ......................................................... 104
   5.2. Going further: The arguments for and against enforceable contracts ................................................................. 105
   5.3. Enforceable contracts: The pre-conditions for validity .......... 107
   5.4. Enforceable contracts: The remaining scope for discretion .... 109
6. Conclusion ..................................................................... 112

COHABITANT OBLIGATIONS: CONTRACT VERSUS STATUS

MARSHA GARRISON ................................................................. 115

1. Cohabitation and family property law: Tradition and change .......... 116
2. New regulatory regimes: How should we choose? ......................... 119
   2.1. Goals and questions ............................................... 119
   2.2. Cohabitation and marriage: The same or different? ......... 120
   2.3. Contract and registration: Can choice ensure fairness? ......... 127
3. Conclusion ..................................................................... 136

PART FOUR – PROTECTION OF OLDER PEOPLE IN LAW

‘LIVING WILL’ LAW UNDER THE GERMAN CIVIL CODE

ALEXANDRA MASCHWITZ.......................................................... 141

1. Introduction .................................................................... 142
2. The protection of elderly persons esp. concerning medical care ...... 143
   2.1. Rights and interests ............................................... 143
   2.2. National measures ............................................... 144
3. The “living will” in Germany .............................................. 146
   3.1. Historical development ......................................... 146
   3.2. Legal definition .................................................... 147
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.3. Requirements for a binding living will</td>
<td>147</td>
</tr>
<tr>
<td>3.3.1. Capacity to consent</td>
<td>147</td>
</tr>
<tr>
<td>3.3.2. Majority</td>
<td>148</td>
</tr>
<tr>
<td>3.3.3. Written form</td>
<td>149</td>
</tr>
<tr>
<td>3.4. Scope of living will</td>
<td>150</td>
</tr>
<tr>
<td>3.5. Legal effects of the living will</td>
<td>152</td>
</tr>
<tr>
<td>3.5.1. General rule: Binding</td>
<td>152</td>
</tr>
<tr>
<td>3.5.2. Limits of the binding nature</td>
<td>154</td>
</tr>
<tr>
<td>3.6. Legal effects of other statements</td>
<td>156</td>
</tr>
<tr>
<td>3.7. The approach of the German Federal Court of Justice</td>
<td>157</td>
</tr>
<tr>
<td>4. Striking a balance</td>
<td>158</td>
</tr>
<tr>
<td>5. Conclusion</td>
<td>159</td>
</tr>
<tr>
<td>Annex: German Civil Code</td>
<td>160</td>
</tr>
</tbody>
</table>

THE PROTECTION OF ELDERLY FAMILY MEMBERS AND THE ROLE OF THE STATE: A FAMILY LAW PERSPECTIVE

Irena Majstorović .......................................................................................................................... 163

1. Changes in definition, the role and the function of a family .......... 164
2. Croatian legislation related to the protection of elderly people .... 166
2.1. The Constitution .................................................................................. 167
2.2. International agreements ................................................................. 167
2.3. Family Act .......................................................................................... 168
2.4. Social welfare Act ............................................................................ 169
2.5. Act on the prevention of discrimination ........................................ 170
3. On guardianship, maintenance and protection from family violence as particularly important areas of human rights protection of elderly people ........................................ 170
4. Guardianship ......................................................................................... 172
4.1. General remarks .............................................................................. 172
4.2. Croatian family law legislation ...................................................... 173
4.3. The role of the state ....................................................................... 175
5. Maintenance ............................................................................................. 176
5.1. General remarks .............................................................................. 176
5.2. Croatian family law legislation ...................................................... 177
5.3. The role of the state ....................................................................... 179
6. Protection from family violence ......................................................... 181
6.1. General remarks .............................................................................. 181
6.2. Croatian legislation ........................................................................ 182
6.3. The role of the state ....................................................................... 183
7. Concluding notes .................................................................................... 184
# Contents

## NON-INSTITUTIONAL CARE FOR SENIORS FROM A CIVIL LAW PERSPECTIVE. A comparative study of housing with services and adult placement in France and Germany

**Eleni Zervogianni**

1. Introduction .................................................. 186  
2. Specialist housing for seniors coupled with services ............ 188  
   2.1. General remarks ........................................ 188  
   2.2. Specialist housing with services in Germany ............... 189  
      2.2.1. Housing with general support services .......... 190  
      2.2.2. Housing with major care and assistance services for dependent seniors ...................... 193  
   2.3. Specialist housing with services in France ................ 194  
      2.3.1. Logements-foyers .................................. 194  
      2.3.2. Résidences services ............................... 195  
   2.4. Evaluation of the results ................................ 197  
3. Adult placement .............................................. 198  
   3.1. General remarks ........................................ 198  
   3.2. Adult placement in Germany ................................ 199  
   3.3. Adult placement in France ............................... 201  
   3.4. Evaluation of the results ................................ 204  
4. Comparative conclusions ...................................... 204

## CARING BY CONTRACT: CARE ARRANGEMENTS FOR OLDER PEOPLE

**Joëlle Long**

1. Introduction .................................................. 208  
2. Converting the family home into long term care .................. 210  
3. Care arrangements for older people as a single genus .......... 218  
   3.1. Common features ........................................ 218  
   3.2. General issues .......................................... 219  
      3.2.1. The competence of the frail older people ....... 219  
      3.2.2. The relationship with care obligations established by the law 223  
4. Conclusion ....................................................... 224
PART FIVE – FREEDOM OF TESTATION AND PROTECTION OF FAMILY MEMBERS

BALANCING INTERESTS – HOW MUCH FREEDOM OF TESTATION?

John Asland ................................................................. 229

1. Introduction ............................................................... 230
2. Balancing of interests under Norwegian inheritance law ............. 235
   2.1. Introduction ......................................................... 235
   2.2. Inheritance rights for cohabitants ................................. 235
   2.3. Inheritance with free right to dispose *inter vivos* and *mortis causa* 237
   2.4. Minimum inheritance and legitimate portion ..................... 239
   2.5. Uskifte .............................................................. 241
   2.6. Distribution based on needs ..................................... 245

3. Conclusions ............................................................... 246

TESTAMENTARY FREEDOM AND CARING ADULT OFFSPRING IN ENGLAND & WALES AND IRELAND

Brian Sloan ............................................................... 251

1. Introduction ............................................................... 252
2. The purposes of succession law ........................................ 253
   2.1. Giving effect to the wishes of the deceased ....................... 253
   2.2. The preservation and security of the family ....................... 254
   2.3. The welfare of society ............................................. 257
   2.4. Summary ............................................................. 259
3. Family provision and caring offspring in England & Ireland .......... 259
   3.1. An outline of English and Irish succession law ................. 259
   3.2. General approach to claims by adult offspring ................. 263
   3.3. Care and the deceased’s obligations ............................. 268
   3.4. Care, conduct and neglect ....................................... 271
   3.5. The significance of a promise of provision ..................... 273
4. Conclusions and scope for development in the law .................... 275

PART SIX – CHILD MAINTENANCE

THE LINK BETWEEN CHILD MAINTENANCE AND CONTACT

Branka Rešetar .............................................................. 279

1. Introduction ............................................................... 280
2. (Non-)linking between contact and maintenance in some European legal systems ........................................ 282

Intersentia xiii
2.1. German law .......................................................... 282
2.2. Croatian law .......................................................... 284
2.3. English law .......................................................... 286
2.4. Swedish law .......................................................... 289
2.5. Comparative conclusion ........................................... 291
3. Results of interdisciplinary research ............................ 293
4. Conclusion ............................................................. 295

PARENTAL MAINTENANCE OBLIGATIONS TOWARDS CHILDREN
IN CENTRAL EUROPE: THE HIGHWAY TO HELL OR A STAIRWAY
TO HEAVEN?
MARTIN KORNEL ......................................................... 297

Summary ................................................................. 298
1. Introduction ............................................................. 298
2. Soviet law as the new family law paradigm (1945–1963) .... 299
4. Family law after the transition (1990–2010) ..................... 305
5. Are we going to hell or to heaven? ................................. 308

THE PRE-HARMONIZATION AREA: A COMPARISON OF
LITHUANIAN, LATVIAN AND ESTONIAN CHILD MAINTENANCE
LAWS
GEDIMINAS SAGATYS .................................................. 311

1. Introduction ............................................................. 312
2. Historical background ................................................. 313
2.1. The period of Soviet occupation ................................. 313
2.2. Family legislation after the restoration of independence ... 315
3. Child maintenance law ................................................. 316
3.1. The creditor .......................................................... 317
3.2. The debtor .......................................................... 319
3.3. The courts’ discretionary powers ................................. 320
3.4. Forms of child maintenance ...................................... 322
3.5. Minimum amount of child maintenance ....................... 324
4. Conclusions ............................................................ 325
PART SEVEN – UNIFICATION OF PRIVATE INTERNATIONAL FAMILY LAW

THE UNIFICATION OF PRIVATE INTERNATIONAL LAW IN EUROPE: A SUCCESS STORY?
Cristina González Beilfuss ......................................................... 329

1. Introduction ................................................................. 330
2. Is complexity the price that has to be paid? .................... 332
3. The relationship between European private international law and national substantive and procedural law .................................................. 335
4. Private international law unification and legal diversity ........ 338
5. Final remarks ............................................................. 340

THE EUROPEANISATION OF INTERNATIONAL SUCCESSION LAW
Anatol Dutta ................................................................. 341

1. The European succession project .................................... 342
2. Three general questions ............................................... 346
   2.1. A monist or a dualist approach? ............................. 346
   2.2. The nationality or residence principle? ..................... 347
   2.3. Freedom to choose the applicable law? ................... 350
3. The scope of the future European lex hereditatis .............. 354
4. Some special issues ..................................................... 356
   4.1. Protection of family members and ‘clawback’ provisions .... 356
   4.2. Testamentary dispositions: Formal validity ................ 357
   4.3. Testamentary dispositions: Existence, material validity, effects and interpretation .................................................. 357
   4.4. Testamentary trusts and statutory trusts upon intestacy ...... 358
   4.5. Rights of the State in heirless estates and simultaneous deaths . . . 358
   4.6. Administration of the estate ..................................... 358
5. Interaction with neighbouring conflict rules .................... 359
6. Annex: Selected legal materials ...................................... 361
   6.2. Hague Convention on the law applicable to succession to the estates of deceased persons of 1989 ........................................ 362
FREEDOM OF TESTATION AND THE PROTECTION OF THE
FAMILY IN PRIVATE INTERNATIONAL LAW
Pia Lokin ................................................................. 369

1. Introduction ...................................................... 370
2. The Hague Convention and the future European Regulation on
Succession .......................................................... 372
  2.1. The Hague Convention ...................................... 372
  2.2. The future European Regulation on Succession .......... 374
    2.2.1. Report by the German Notary Institute .............. 375
    2.2.2. European Parliament .................................. 376
    2.2.3. The European Succession Proposal .................. 376
3. Conclusions ...................................................... 380

EU SUCCESSION REGULATION: CHOICE OF APPLICABLE LAW
AND PROTECTION OF FAMILY MEMBERS
Anna Wysocka ....................................................... 383

1. Introduction ...................................................... 384
2. Applicable law – General rule ................................ 387
3. Choice of the applicable law ................................ 390
  3.1. Protection of family members by excluding the possibility to
       choose the applicable law .................................. 391
  3.2. Protection of family members by providing an exhaustive list of
       laws that may be chosen by the future deceased ........ 393
  3.3. Protection of family members by limiting the implications of the
       choice of the applicable law by the deceased .......... 399
  3.4. Protection of family members by referring to public policy .... 402
  3.5. Protection of family members by following special rules
       provided in the Member States’ private international law .... 404
4. Conclusion ......................................................... 405

INTERNATIONAL CHILD MAINTENANCE IN EUROPE
Philip Bremner* ..................................................... 407

Introduction ......................................................... 408
2. The 2009 Special Commission ................................ 413
3. Enforcement under the EU Maintenance Regulation .... 416
4. Relationship between the EU Regulation and the Hague Convention .... 417
Conclusion ............................................................ 419
PART EIGHT – CLOSING REMARKS

THE FUTURE OF FAMILY PROPERTY IN EUROPE
   Jo Miles and Jens M. Scherpe ........................................ 423

1. Common law meets civil law ........................................... 424
2. Shared social and legal policy challenges .......................... 425
3. Matrimonial property and maintenance: Joint or several issues? 426
4. A special domestic problem: The family home .................... 428
5. The scope for autonomy ............................................... 429
6. Private international law ............................................... 431
7. Conclusions – and the road ahead ................................. 432
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TESTAMENTARY FREEDOM AND 
CARING ADULT OFFSPRING IN 
ENGLAND & WALES AND IRELAND

BRIAN SLOAN*

1. Introduction .............................................. 252
2. The purposes of succession law ........................................ 253
  2.1. Giving effect to the wishes of the deceased ..................... 253
  2.2. The preservation and security of the family .................... 254
  2.3. The welfare of society .................................... 257
  2.4. Summary ............................................. 259
3. Family provision and caring offspring in England & Ireland ....... 259
  3.1. An outline of English and Irish succession law ................. 259
  3.2. General approach to claims by adult offspring ................. 263
  3.3. Care and the deceased’s obligations .......................... 268
  3.4. Care, conduct and neglect .................................. 271
  3.5. The significance of a promise of provision .................... 273
4. Conclusions and scope for development in the law ................. 275

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1. INTRODUCTION

The default rule in English succession law is that ‘an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases’. Nevertheless, family provision legislation has made significant incursions into that principle in England and Wales, as well as its equivalent in other common law jurisdictions. Under such family provision statutes, certain family members and dependants may apply for discretionary financial provision out of a deceased person’s estate where the deceased’s will and/or the default intestacy rules have failed to make suitable provision for the applicant.

This chapter concerns family provision claims made in two European jurisdictions, namely England and Wales and the Republic of Ireland, by adult offspring who have provided care for their now-deceased parents. The ageing population in Europe is highly relevant to this question in two respects. First, it may cast doubt on the purposes of family provision law and succession law in general, since people are less likely to be in financial need by the time their parents die. Secondly, the fact that the population is ageing increases the long-term care needs present among the general population, and raises the question of whether and how the state should encourage informal care provided by family members, including offspring.

The chapter begins by discussing the purposes of succession law and considering the extent to which succession law can and should be used to reward, support or encourage informal care. After summarising succession law in England and Wales and the Republic of Ireland, the chapter then considers the relevance of care to family provision claims made by adult offspring in those jurisdictions. The chapter concludes by assessing the need for and likelihood of reform in those jurisdictions to increase the relevance of care to such claims.

---

1. Re Coventry (deceased) [1980] Ch 461, at 474.
3. The terminology used to describe the provision varies between jurisdictions.
2. THE PURPOSES OF SUCCESSION LAW

This section explores the purposes of succession law and assesses the extent to which it can and should be used to support, reward or encourage care provided by family members. Peart summarises the accepted purposes of succession law as:

… consider[ing] the wishes of the individual … the preservation and security of the family, and … [protecting] the welfare of society in general by promoting the equalization of fortunes.6

There is an inherent tension in these aims, and the relative importance attached to each of them varies between jurisdictions. Indeed, scholars such as Locke and Grotius regarded freedom of testation as inherent in Natural Law, while also accepting a child’s natural right to succeed to his parent’s estate.7

In the present context, a more fundamental problem is that, at first glance, recognition of care in itself is unlikely to satisfy any of these purposes. It may be that the rationale of succession law is in need of re-evaluation. Even if Peart’s rationales are preferred, however, a relatively modest extension may be able to justify provision for a carer. The following sub-sections undertake this task.

2.1. GIVING EFFECT TO THE WISHES OF THE DECEASED

In some cases such provision for a carer may in fact reflect the wishes of the deceased. Since only 36% of English and Welsh respondents to a survey by the National Consumer Council had made a will,8 it could be thought that family provision for a carer would give effect to the true wishes of the deceased in many cases. That said, where a will is made, it has been suggested that most testators bequeath property based on the formal ‘positions’ of each beneficiary in relation to the deceased,9 ie the category of family member to which a beneficiary belongs. Often, it appears that little account is taken of the particular relationship between each individual and the deceased.10 One study found that respondents

10 Izuhara contrasts this position with the tradition in Japan (now in decline), whereby the eldest son and his wife are placed under a duty to provide care to the parents, and the son inherits the house in return: M. Izuhara, Housing, Care and Inheritance, Abingdon, Routledge, 2008.
disapproved of linking inheritance with care,\textsuperscript{11} although there is also at least some evidence to the contrary.\textsuperscript{12}

The perceived importance of giving effect to the wishes of the deceased may lead to an argument that the law should provide for carers only when a promise has been made by the care recipient and relied upon by the carer. In many common law systems, the equitable doctrine of proprietary estoppel provides a mechanism for enforcing oral promises made by the deceased outside of succession law,\textsuperscript{13} while in New Zealand there is a statute to perform this function.\textsuperscript{14} The significance attached to promises in the context of family provision claims is considered below.

Nevertheless, it should be borne in mind that the intentions of the deceased are not always particularly relevant in relation to family provision claims, although they will often be taken into account.\textsuperscript{15} If society is content to override the intention of the deceased for certain purposes, it could be argued that it should be willing to do so in order to recognise care provided.

\subsection*{2.2. THE PRESERVATION AND SECURITY OF THE FAMILY}

Turning to the second of Peart’s rationales, the preservation and security of the family is arguably furthered by care given to the deceased before death. It may therefore be legitimate to use family provision statutes to support or reward the carer.

It must be conceded, however, that a more plausible argument based on the preservation and security of the family is likely to be made in favour of those with an expectation of inheritance, whether they are spouses, offspring or others. In 1985, Ross Martyn argued that children of the deceased had a ‘moral claim’ on their parent’s estate, irrespective of whether they were in need.\textsuperscript{16} Frolik has gone as far as to claim that human beings are ‘predisposed to leaving a legacy to our

\textsuperscript{11} K. Rowlingson, \textit{Attitudes to Inheritance: Focus Group Report}, University of Bath, cited in Izuhara, \textit{Housing, Care and Inheritance}, at 110.
\textsuperscript{14} Law Reform (Testamentary Promises) Act 1949 (NZ).
\textsuperscript{15} See R. Kerridge, \textit{Parry and Kerridge: The Law of Succession}, Sweet & Maxwell, London, 12th ed 2009, at [8–31] for discussion. In the Irish Supreme Court case of \textit{EB v SS}, for example, Keane J opined that ‘the clearly expressed wish of the testatrix in this case to treat all her children equally, although not a decisive factor, is not entirely irrelevant’ ([1998] 2 IR 141, at [29]).
children by our own genetic and cultural legacies’. Moreover, a presumption that certain family members should inherit a deceased person’s estate is arguably reflected in the intestacy rules and in the practice of testators.

Arguments about entitlement to inheritance would be particularly influential in those jurisdictions where certain relatives receive fixed portions of an estate. That said, care is now recognised even in Germany, where a system of guaranteed rights to share in the estate is in operation. Moreover, in Scotland, where children have the right to claim an amount of money representing a fixed proportion of a parent’s estate irrespective of the provisions in the will, the Law Commission recently proposed two options for reform. One of these would restrict any entitlement to dependent children.

Writing from a common law perspective, Peart and Borkowski claim that ‘the great potential for harm resulting from the disinheritance of children is obvious’. That may indeed be true in situations where there are dependent minor children to whom the deceased would owe a duty of support if she were still alive. But the fact that people are living longer may mean that parents expect their children to achieve financial independence rather than relying on inheritance. Even historically, the potential for unearned distributions from estates has been invoked as a justification for limiting both testamentary freedom and rights of inheritance. This is related to Blackstone’s contention that wills were introduced as a result of the prevalence of ‘disobedient and headstrong’ heirs. It is therefore possible to question the cogency of perceived rights of inheritance solely on the basis that a person is the son or daughter of the deceased, and the courts have done so when considering family provision claims by adult children. Similar

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18 Administration of Estates Act, s 46 (England & Wales); Succession Act 1965, Part VI (Ireland).
19 Finch et al, Wills, Inheritance and Families.
27 See Section 3.2 below.
Arguments could be made in the case of spouses, civil partners and unmarried cohabitants.

It is not necessarily the case, therefore, that succession law should give effect to expectations of inheritance based on familial relationships alone. Indeed, Rowlingson and McKay found that an expectation of inheritance was by no means universal among the cohort selected for their empirical study in the UK, although 90% of those who did expect to receive a bequest expected it to come from their parents.28

The diminishing significance of familial relationships in themselves in the context of property dealings may reduce the perceived moral entitlement of children to inherit their parents’ property, and thereby benefit carers. While Reid sees the frequent assumption of responsibility for informal care as a potential justification for retaining fixed shares for family members in Scotland,29 she also accepts that care responsibilities are often distributed among only a few family members.30 This in turn suggests that entitlement to inherit could be confined to those who in fact provide care, or at least that it could be enhanced for such individuals. At the same time, the corresponding recognition of the potential for independence among adult children may work against those who have in fact provided care for the parent.

The corollary of doubt about provision for non-dependants on the basis of familial relationship alone is that provision for those who have earned it (including carers) may be a legitimate aim for succession law. In the context of proposed reforms to testamentary promises legislation, the New Zealand Law Commission have written that it is undesirable to confuse provision made in order to support family members and that made with the aim of ‘rewarding valuable services for which the [deceased] should in fairness pay’.31

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30 This point is made in Scottish Law Commission, *Report on Succession*, at [3.26].
2.3. THE WELFARE OF SOCIETY

Finally, the welfare of society is arguably protected if informal care is supported using succession law, although not specifically through ‘the equalization of fortunes’ as qualified by Peart. Scholars such as Fineman\(^{32}\) argue that the support of informal care, and of the carers who provide it, is not a matter of empathy or altruism, but of the preservation of society itself. This analysis has been praised because it ‘changes the basis of entitlement from need to desert’,\(^{33}\) but it does not of itself lead to a conclusion that succession law is the most appropriate mechanism through which to support carers.

Oldham, however, expresses concern about the heavy financial burden that would be imposed upon the state in the absence of private caring.\(^{34}\) Indeed, while the outgoing UK Government recently announced a ‘national care service’ with the aim of providing formal care free of charge at the point of delivery,\(^{35}\) it seems likely that the precise means of funding any similar service will remain unclear for some time. Oldham advocates a system of ‘successional priority’, which would give a person who takes care of a relative a prioritised right of compensation from that relative’s estate.\(^{36}\) She suggests that such a ‘priority’ concept could be combined with equity release and a state-sponsored loan system to provide a more instantaneous incentive for an informal carer. Oldham claims that private law measures such as those embodied in her proposal, with the idea of a *quid pro quo* for care, would foster the idea of interdependence rather than dependence. She goes as far as to argue that such measures could be necessary to support and encourage care.

Oldham accepts that some would reject her scheme on the basis that care should be provided on the basis of affection rather than mercenary considerations. While one recent report on care funding admitted that ‘unpaid carers are by definition not ‘in it for the money’’,\(^{37}\) Oldham claims that this sort of view can fail to take account of the ‘modern, economy-driven world’.\(^{38}\) Moreover, just as family members do not necessarily expect to receive a bequest on the death of a relative, there is evidence that most people legitimately expect to make a contribution

\(^{34}\) OLDHAM, ‘Financial Obligations within the Family’.
\(^{36}\) OLDHAM, ‘Financial Obligations within the Family’, at 173.
towards formal care (whether for themselves or someone else), although many do resent the idea that they should sell their homes in order to pay for care.

If it is assumed that support for carers using private law mechanisms can be justified at least partially, it could be argued that succession law is the ideal method by which to reward carers. The care recipient is no longer in need of her resources on her death, and there is less scope for the awkwardness that could prevail between carer and care recipient if the subject of reward is discussed during the care recipient’s life.

It has been seen, however, that the use of family provision statutes to support or compensate the carer is likely to meet objections from those who emphasise either testamentary freedom or a perceived moral entitlement based on a blood or sexual relationship with the deceased. At the other end of the spectrum, such usage of succession law is unlikely to satisfy feminist scholars on care. Given the high opportunity costs of caring, a reward given to a carer after he has finished caring may come too late. Indeed, some care recipients who participated in a qualitative study by Izuhara ‘tried to compensate [their familial carers] on the spot rather than let them accumulate any advantage and pass it on to them at death’.

Until large-scale structural changes to society are made in order to support carers more comprehensively, it could be said rewarding carers out of the estate of a care recipient is better than nothing. The argument to be pursued here is a modest compromise between public and private provision. It is suggested that if policy-makers are content to redistribute estates by statute to individuals with some connection to the deceased, care should be relevant when deciding upon any relief to be granted. Indeed, Deech has recently criticised the law of family provision in England and Wales for continuing to ‘prefer the idle sexual partner over the deserving family member’ who may provide care.

Nevertheless, it is not the purpose of this chapter to argue that the level of reward can or should be commensurate with the commercial value of the services provided. Indeed, the precise basis for and measure of relief for an informal carer

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40 ROWLINGSON, “Living Poor to Die Rich”? Or “Spending the Kids’ Inheritance”?’, at 177, and the references there cited. The proposed ‘National Care Service’ attempted to avoid this prospect.
41 Perrins v Holland [2009] EWHC 1945 (Ch) is a recent example of a case where a son of a testator sought provision under the English Inheritance (Provision for Family and Dependants) Act 1975 where the estate had been left to a woman whom the deceased described (perhaps misleadingly) as his ‘carer’ [at 1]). The trial, however, focussed on testamentary capacity.
would have to be a topic of further discussion. One possibility, based on the New Zealand Law Commission’s proposal of a ‘contribution claim’, is discussed in the final section of the chapter. In addition, it is not suggested that a carer should necessarily trump the claims of others who expect a share in the care recipient’s estate, or that the care recipient’s wishes and intentions should be considered irrelevant.

Moreover, succession law can never be an all-encompassing solution to the conundrum of support for carers. Part of the reason for this is that some care recipients will not leave significant assets behind them, not least because many will have had to pay for formal care. What can be said is that, on the level of principle, succession law may be a useful tool in supporting informal carers in some circumstances.

2.4. SUMMARY

It has been argued thus far that the support of carers using succession law can be justified with reference to at least some of the accepted aims of that area of law, and that rights of inheritance on the basis of family relationship alone may no longer be justifiable. The remainder of this chapter considers the relevance of care to family provision claims in England and Wales and Ireland.

3. FAMILY PROVISION AND CARING OFFSPRING IN ENGLAND & IRELAND

This section begins by outlining the law of succession in the jurisdictions under consideration, before describing the general approach to family provision claims by adult offspring. As will become clear, it is highly significant that such claims are limited to providing for the offspring’s ‘maintenance’ in England. The remainder of the section considers the relevance of care in adjudicating upon such claims. This is accomplished by assessing whether care is said to impose an obligation on the deceased to make provision, whether it constitutes pertinent conduct on the part of the applicant, and whether it is likely to be taken into account when combined with a promise of provision.

3.1. AN OUTLINE OF ENGLISH AND IRISH SUCCESSION LAW

As stated above, the predominant principle of English succession law is that of testamentary freedom. While Nield claims that the principle has existed since...
feudal times, Borkowski argues that ‘testamentary freedom was severely limited for much of English legal history’ and testators were substantially unencumbered for only about a century. Under the present law, nonetheless, it is perfectly possible for a care recipient to reward her carer by bequeathing property to him, and the converse is also true.

This possibility contrasts with the position in many civil law jurisdictions, where testamentary freedom is limited by compulsory portions of the estate being reserved for particular family members. The English Law Commission considered the introduction of compulsory portions for family members in 1971, but subsequently rejected the idea. Family provision, which originated in New Zealand, is therefore an important exception to the general rule of testamentary freedom in England and Ireland, and on one view renders it ‘not so far adrift’ from the civil law approach.

The scope of family provision law in England and Wales has widened considerably over the course of its history, as has that of its counterparts in Australia and New Zealand. The English Inheritance (Provision for Family and Dependants) Act 1975 allows claims for financial provision out of an estate by spouses and civil partners of the deceased, former spouses and civil partners who have not entered a subsequent marriage or civil partnership, unmarried cohabitants who lived as if they were the deceased’s spouse or civil partner for two years prior to the death, all legal children of the deceased and those whom she treated as a

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44 S. NIELD, “‘If you look after me, I will leave you my estate’: The enforcement of testamentary promises in England and New Zealand” (2000) 20 Legal Studies 85, at 86.
45 BORKOWSKI, Textbook on Succession, p 258.
48 Testator’s Family Maintenance Act 1900 (NZ).
50 Peart and Borkowski, ‘Provision For Adult Children On Death’, at 333; DE GROOT and NICKEL, Family Provision in Australia, at [1.6].
51 The court can make a wide range of orders, including for periodical payments, transfer of a lump sum or transfer of property: Inheritance (Provision for Family and Dependants) Act 1975, s 2.
52 Civil Partnership is the UK’s legal near-equivalent of marriage, available exclusively to same-sex couples. See the Civil Partnership Act 2004.
53 Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(a).
54 Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(b).
55 Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(ba).
56 Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(c).
child of the family in relation to a marriage or civil partnership,\(^{57}\) and those who were dependent on the deceased even in the absence of a familial relationship.\(^{58}\) The English Act applies whether or not the deceased left a will. This contrasts with the position in Irish Law, under which claims by children are possible only where the deceased dies wholly or partially testate,\(^{59}\) and not where the intestacy rules apply.\(^{60}\) This state of affairs has been criticised.\(^ {61}\)

Further changes to English Law may materialise in the near future: the Law Commission is currently conducting a review of the 1975 Act alongside the rules of intestacy, and a report and draft Bill are expected in late 2011.\(^ {62}\)

Before proceeding with the discussion, it must be noted that despite its wide scope, the 1975 Act is a remedy for neither unfairness nor unjust enrichment.\(^ {63}\) The question to be asked by the court is not whether it would have been reasonable for the applicant to receive more out of the estate, but effectively whether it was unreasonable for him not to have done so. Similarly, it was emphasised in one Irish case that the court does not have ‘a power to make a new will for the testator’ and should not ask ‘which of the alternative courses open to the testator the court itself would have adopted’.\(^ {64}\)

As Green puts it, when considering whether and how to exercise its discretion to make provision for an applicant, the court is given the difficult task of resolving:

… the claims of the testator to have her final wish enforced, the heir who may be deprived of her expectation … and of the applicant who has some moral claim to the estate.\(^ {65}\)

\(^{57}\) Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(d). The Law Commission has recommended that the reference to a marriage or civil partnership be removed: Law Commission, Intestacy and Family Provision Claims on Death, Consultation Paper 191, HMSO, London, 2009, at [6.9].

\(^{58}\) Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(e).

\(^{59}\) Succession Act 1965, s 109.

\(^{60}\) However, the Act applies even where the will is rendered inoperative: RG v PSG and Another [1980] ILRM 225.


\(^{64}\) In the matter of the estate of ABC, deceased; XC v RT [2003] 2 IR 250, at 264.

As such, it is perhaps unsurprising the emphasis in the English Act itself and in the case law remains upon providing maintenance for dependants unless the applicant is a spouse or civil partner. Therefore, even if care is seen as a relevant consideration in ascertaining the extent of the provision that he should receive, it is arguable that this does not give effect to the underlying purpose of the Act in its current form unless the carer needs to be maintained in the future.

Irish Law operates more of a fixed system than is in evidence in England and Wales, such that freedom of testation is less prominent, and it seems that this reflects a desire to replicate at least some of the principles found in civil law jurisdictions.66 Under the Succession Act 1965, the surviving spouse has a ‘legal right’ to half of the estate where there are no children and one third of it where there are children.67 This applies when the deceased left a will, and the spouse has a right to elect whether to take the portion allotted to her under the will (if any) or the ‘legal right’.68 Although former spouses do not possess the ‘legal right’, those who have not remarried can make a claim for provision out of their deceased former spouse’s estate.69 The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 largely extended the legal right to same-sex civil partners,70 and ‘qualified’ unmarried cohabitants will be able to apply for discretionary provision out of their deceased partners’ estates.71

Irish offspring, meanwhile, can make claims against an estate on the basis that the deceased ‘failed in his moral duty to make proper provision for the child in accordance with his means’.72 Such a claim cannot affect the legal right of the spouse, or indeed her share under the will or intestacy if that spouse is the parent of the applicant,73 which will reduce the proportion of the estate available for redistribution in many cases. Relevant ‘children’ now include those born out of

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67 Succession Act 1965, s 111.

68 Succession Act 1965, s 115. The ‘legal right’ can be renounced by pre-nuptial agreement, or in writing following the testator’s death (s 113).

69 Family Law (Divorce) Act 1996, s 18.


71 Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s 194.

72 Succession Act 1965, s 117(1).

73 Succession Act 1965, s 117(3). Cf. the English scepticism relating to the concept of ‘moral duty’, discussed in sub-section 3.3 below.
wedlock and adopted children, but there does not appear to be any equivalent of the English ‘child of the family’.  

In *Re GM; FM v TAM and others*, Kenny J emphasised that the Irish Act was not based on a duty to provide maintenance, and went as far as to say that authorities from New Zealand, New South Wales and England were of ‘little assistance’ when making decisions under the 1965 Act. As discussed below, however, the needs of the applicant are often central to such determinations.

Having outlined the general scheme of family provision in England and Ireland, the next sub-section considers the approach to claims by adult offspring in more detail.

### 3.2. GENERAL APPROACH TO CLAIMS BY ADULT OFFSPRING

The position of the adult child who has cared for a parent is a complex one in the context of family provision law. The adjudication of a claim in both England and Ireland involves a two-stage process, although similar considerations will be relevant at both stages.

Under the Inheritance (Provision for Family and Dependants) Act 1975, the court must ascertain, from an objective perspective, whether the will and/or the intestacy rules ‘make reasonable financial provision’ for the applicant’s maintenance. The term ‘maintenance’, in turn, has been defined as encompassing ‘payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him.’ If the court concludes that reasonable financial provision has not been made, it must then decide which of its powers to exercise in order to remedy that insufficiency.

Under the Irish 1965 Act, the first stage is to assess whether the testator ‘has failed in his moral duty to make proper provision for the child in accordance with his

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74 In *EB v SS* [1998] 2 ILM 141, an attempt to argue that a moral duty was owed by the deceased to her grandchildren via her responsibility to the applicant was rejected by a majority of the Supreme Court.
75 (1972) 106 ILR 82, at 86.
77 Inheritance Act 1975, s 1(1).
78 Inheritance Act 1975, s 1(2)(b). Spouses and civil partners are not subject to this limitation: s 1(2)(a-aa).
79 Inheritance Act 1975, s 2. Spouses and civil partners are not subject to this limitation: s 2(1)(a-aa).
80 *Re Dennis (Deceased)* [1981] 2 All ER 140, at 145.
81 Inheritance Act 1975, s 2.
means, whether by his will or otherwise. During the second stage, the court may ‘order that such provision shall be made for the child out of the estate as the court thinks just’.

The English Act contains a list of factors that to which the court should have regard in making its determinations, some of which apply to all applicants and some of which are aimed specifically at claims by children of the deceased. The Irish courts, on the other hand, are instructed to ‘consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children’. The extent of the deceased’s moral duty is judged at the date of death with reference to the entitlement of the surviving spouse, the number, age and position in life of the testator’s other children, the testator’s means, the age, financial position and prospects of the applicant and any provision that the testator made during his life for the applicant.

In England the focus of the award of relief is very much on the future needs of the applicant considered at the date of the hearing, due to the ‘maintenance’ limitation. For example, the Act specifies ‘the manner in which the applicant was being or in which he might expect to be educated or trained’ as a relevant factor in applications by adult children, which is a distinctly forward-looking factor. Indeed, although the award is not necessarily limited to providing ‘bare necessities’, it has been suggested by Peart and Borkowski that the English judiciary have adopted a ‘parsimonious’ approach to claims by adult children. This is encapsulated in Browne-Wilkinson J’s remark that:

A person who is physically capable of earning his own living faces a difficult task in getting provision made for him, because the court is inclined to ask: ‘Why should anybody else make provision for you if you are capable of maintaining yourself?’

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82 Succession Act 1965, s 117(1).
83 Succession Act 1965, s 117(1).
84 Inheritance Act 1975, s 3(1).
85 Inheritance Act 1975, s 3(3).
86 Succession Act 1965 s 117(2).
87 Re GM deceased; FM v. TMM (1970) 106 ILTR 82, at 87.
89 Inheritance Act 1975, s 3(3).
91 Peart and Borkowski, ‘Provision For Adult Children On Death’, at 333.
92 Re Dennis, at 145.
It seems that a claim by an adult child in employment and with future earning capacity is unlikely to succeed in England unless the applicant can show that the deceased owed a moral obligation to him, or that some other special circumstances justify the order, although neither of these constitute a ‘threshold requirement’ and the size of the estate is a pertinent consideration. Moreover, Matthews claims that there has been a recent increase in successful claims by ‘ostensibly able-bodied’ adult children under the 1975 Act.

Something of a focus on the future needs of the applicant is also prevalent in Ireland, although the courts are not formally constrained by a ‘maintenance’ limitation. As Kearns J explained in his much-quoted synthesis of the case law on s 117, ‘[t]he social policy underlying s 117 is primarily directed to protecting those children who are still of an age and situation in life where they might reasonably expect support from their parents’. Moreover, in the case of in the Goods of JH, deceased, Barron J expressed the view that:

In general, [a failure to fulfil the moral duty] will arise where the child has a particular need which the means of the testator can satisfy in whole or in part. If no such need exists, even where no provision has been made by the testator by his will or otherwise, the Court has no power to intervene.

The potential for education to provide long-term security and the importance of meeting needs caused by disability have also been recognised in Ireland. Although the courts were initially generous to claimants who were adult children, the onus of proof is ‘relatively high’ and a positive failure to comply with the moral duty must be established. This will be particularly true where the child is not dependent on the parent, although the application of the Act is not limited to such cases, and some claims have succeeded where the applicant was in a relatively strong financial position. Moreover, in contrast to the ‘parsimonious’ approach of English Law on Peart and Borkowski’s account,
Keane J described the provisions that can be invoked by children under the Irish legislation as ‘extremely ample…even in the middle aged and elderly category’.  

In any case, the focus on needs is to some extent prevalent in both England and Ireland, and it may be problematic for the familial carer. Some carers may have needs caused by the opportunity costs of caring, not least because of the impact that care can have upon carers’ earning capacity and health, and the desire to compensate and recognise the contribution of the carer will have a strong relationship with that fact. Indeed, the relationship between principles based on compensation and those based on need has been recognised by the UK House of Lords in the context of financial provision on divorce. As Miles points out:

> Need and compensation will often be coterminous: the applicant’s need is a symptom of the fact that … she forewent earning capacity in order to contribute to the welfare of the family through caring for home and children.

This reasoning could apply to carers for adults. On the other hand, the very nature of the applicant’s role as a carer means that he was addressing the needs of the deceased, and may not have any future needs of his own given that the care recipient has died. Moreover, the courts have recently demonstrated more of an expectation that spouses who look after children will eventually return to work in some sense in the context of provision on divorce, and a similar attitude could be taken to children who care for their parents.

Of course, the justification for providing for a carer may be greater when a carer has such needs, but it is questionable whether ‘need’ should be a necessary condition for a carer to receive something out of the care recipient’s estate, since that would fail to recognise the value of care provided in the past. This issue is a recurring theme throughout this chapter.

Moreover, any difficulty in bringing a claim where earning capacity is retained is particularly problematic when compared to cases involving so-called ‘lame

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106 *EY v SS* [1998] 4 IR 527, at 560.
109 See, e.g., Miller v Miller; McFarlane v McFarlane [2006] UKHL 24 at [155].
111 In *Graham v Murphy*, a case involving a carer who was applying for provision as a dependant of the deceased, Robert Walker J noted that the applicant was employed and ‘no longer ha[d] to take time off to look after’ the deceased ([1997] 1 FLR 860, at 867).
112 See, in particular, Miller v Miller; McFarlane v McFarlane [2006] UKHL 24.
ducks'113 where the applicant has needs caused by his own failings. *Espinosa v Bourke*,114 discussed in detail below, is arguably an example of such a case, since provision was made in spite of the fact that the applicant eventually neglected her father and found herself in necessitous circumstances due at least in part to a lifestyle of which the deceased clearly disapproved. Kerridge criticises the 'unfairness towards children...who, having led virtuous lives, are then treated less generously than their prodigal brothers and sisters'.115

In New Zealand, in contrast to England and Ireland, the relationship of parent and child was traditionally considered sufficient in itself to justify provision,116 and a common reason for claims under the Family Protection Act 1955 was that the testator has failed to provide equally for each of her children.117 The expansive interpretation of the Act undertaken by the courts led the New Zealand Law Commission to propose reforms that would restrict adult children from making support claims unless they are in genuine need or the claim relates to 'a memento or keepsake of modest value',118 although they could make a 'contribution claim' if they had benefited the deceased in some way.119 These proposals were never implemented, but as a result of the Law Commission's report, Peart and Borkowski claim that the New Zealand courts have recently adopted a more cautious approach, albeit still more liberal than in England.120

Before the more restrictive approach recently adopted, New Zealand was towards the other end of the scale from both English and Irish Law. There is a risk that a caring son or daughter will fall between these extremes. Such carers may fall outside the English or to a lesser extent the Irish Act through a lack of future need, and yet their care is given no recognition if they are provided for simply because of their legal relationships with their parents, as they may be under 'forced heirship' regimes. The next sub-section investigates whether these difficulties can be circumvented through the idea that the receipt of care generates an obligation on the part of the deceased such that it can be given specific recognition.

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113 Re Hatte [1943] St R Qd 1 (Queensland), 26.
116 Peart and Borkowski, 'Provision For Adult Children On Death'. *Cf. eg. In the matter of the estate of ABC, deceased; XC v RT* [2003] 2 IR 250, at 263, where Kearns J stated that '[t]he relationship of parent and child does not, itself and without regard to other circumstances, create a moral duty to leave anything by will to the child'.
117 Peart and Borkowski, 'Provision For Adult Children On Death'.
120 Peart and Borkowski, 'Provision For Adult Children On Death', at 339–342.
3.3. CARE AND THE DECEASED’S OBLIGATIONS

There has been something of a tendency to emphasise a need to show moral obligations owed by the deceased in the English case law involving adult children,\(^{121}\) and this has been criticised as a value-laden relic of earlier legislation.\(^{122}\) In *Espinosa v Bourke*, Butler-Sloss LJ denied that the Court of Appeal had placed a ‘gloss’ on the language of the present legislation,\(^ {123}\) under which the court is directed to have regard, *inter alia*, to ‘any obligations and responsibilities which the deceased had towards any applicant’.\(^ {124}\) All of the judges in that case expressed misgivings about the use of the word ‘moral’, emphasising that it was intended simply to avoid restricting relevant obligations to legal ones. In *Re Hancock*, moreover, it had previously been confirmed that a moral obligation was not a precondition of a successful application.\(^ {125}\) The concept of a moral obligation remains in evidence even in England, however, and Borkowski notes that the courts have often been reluctant to clarify its meaning.\(^ {126}\)

The English courts have said that care could generate a relevant ‘moral obligation’, even if it is not necessary to demonstrate one. In *Re Jennings*, Henry LJ considered a hypothetical scenario in which an adult child gave up a university place ‘to nurse the deceased through his long last illness’.\(^ {127}\) Henry LJ suggested that there would be a ‘clear’ moral obligation on the deceased to enable the applicant to take up that place.\(^ {128}\) Inevitably, however, the focus would be on any need for maintenance generated by caring, even if the obligation could justify the success of a claim by a child in some form of employment or with earning capacity. That said, in the Northern Irish case of *Estate of McGarrell*,\(^ {129}\) applying legislation modelled on the English 1975 Act,\(^ {130}\) Hutton J found that the applicant had established a moral claim on her father’s estate by doing housework for and looking after him. An order was made even though it is doubtful that the applicant’s earning capacity was affected by the work she did.\(^ {131}\) Hutton J was content that the applicant was living in ‘difficult financial circumstances’, and for him it was sufficient that the

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121 This has been caused mainly by the ‘misinterpretation’ of *Re Coventry*, which prevailed for some time: A. Borkowski, ‘Moral Obligation and Family Provision: *Re Hancock* (Deceased) and *Espinosa v Bourke*’ (1999) 11 CFLQ 305.
124 Inheritance Act 1975, s 3(1)(d).
126 Borkowski, ‘Moral Obligation and Family Provision’.
129 [1983] 8 NIIB.
order would not ‘constitute something in excess of maintenance’.\textsuperscript{132} The case has been cited, albeit some time ago, as evidence that adult claimants are treated more generously in Northern Ireland than in England.\textsuperscript{133}

In the English case of \textit{Espinosa v Bourke}, it was accepted that the applicant was owed a moral obligation by her deceased father because of the care that she provided for him (as well as because of a promise that he would leave certain property to her).\textsuperscript{134} The judge at first instance found that any obligation had been discharged by the deceased during his life through direct transfers and benefits in kind. Such countervailing benefits will be important considerations in any care scenario. On appeal, however, it was held that the judge had focused too heavily on the obligation question at the expense of considering the applicant’s financial position. The Court of Appeal concentrated instead on the applicant’s lack of earning capacity and the promise that the father had made in allowing the applicant’s appeal and making an order. But Butler-Sloss LJ appeared to accept that the care in \textit{Espinosa} could itself have generated an obligation if it had not been compensated for by the father’s payment of the mortgage and other outgoings.\textsuperscript{135}

Similarly, in \textit{Re Coventry} it was suggested that a moral obligation may be generated by an applicant’s forgoing of an adequate living to look after a disabled parent.\textsuperscript{136} Nevertheless, neither the first instance judge nor the Court of Appeal could find sufficient evidence of such a sacrifice on the facts. It was noted that the applicant had the benefit of free accommodation provided by the deceased during the relevant period, and his claim failed in spite of the fact that his income was modest.

\textit{Re Callaghan} demonstrates that care provided by a ‘child of the family’ may be relevant in determining whether reasonable financial provision has been made under the 1975 Act.\textsuperscript{137} In that case, the deceased had treated a step-son as if he were a biological child of his own, and took responsibility for advising, supporting and disciplining him at various stages in the step-son’s life. The applicant step-son and his wife undertook to provide care for the deceased during the last four months of his life, during which time he suffered from a ‘painful and distressing illness’ and was a ‘bad patient’ who discharged himself from hospital several times.\textsuperscript{138} Booth J held that the deceased’s obligations and responsibilities towards the applicant were ‘very considerable indeed’, effectively being those of a ‘widowed parent to a

\textsuperscript{132} [1983] 8 NIIB.
\textsuperscript{133} S. Grattan, ‘Of Lame Ducks, Black Sheep and Family Bonding’ (2000) 51 NILQ 198, at 228.
\textsuperscript{134} [1999] 1 FLR 747.
\textsuperscript{135} [1999] 1 FLR 747, at 757.
\textsuperscript{136} [1980] 1 Ch 462, at 490 and 495.
\textsuperscript{137} [1985] Fam 1.
\textsuperscript{138} [1985] Fam 1, at 4.
dutiful and responsible only child’. An award under the 1975 Act was therefore made, although the fact that the applicant was not the legal child of the deceased may have had a significant impact on the outcome in the case.

The English courts are therefore somewhat ambivalent on the question whether care is sufficient to generate a relevant obligation in any given case, as well as on the relevance of an obligation thereby generated when fashioning relief. Any obligation generated by care clearly interacts with the other statutory factors, and the ‘maintenance’ limitation is ever-present.

The English antipathy towards the concept of ‘moral obligation’ obviously contrasts sharply with the position in Ireland, where the language of ‘moral duty’ remains on the face of the legislation. There, the statute apparently assumes that such a moral duty to make proper provision for one’s children originally exists and, although the duty is not absolute and its extent is variable, the first question for the court is generally whether the testator failed to discharge that duty in the particular case, whether by his will or otherwise, before death.

In the case of CW v LW, an order was made under the 1965 Act in favour of a daughter who had looked after both her parents, for a salary, and lived with them. However, the aim of the order was to provide greater security of income than would have resulted from the distribution of her parents’ estate. The applicant’s limited earning capacity, rather than the care itself, was the decisive factor, although Sullivan J explicitly rejected the suggestion that the applicant could embark upon a career as a carer as a result of her experience with her parents. The €600 per week paid to her by the Solicitor General by virtue of her mother being a ward of court was said to be ‘a measure of her value to her mother rather than an estimate of her earning capacity in the open market’.

Similarly, in H v O’C and others, provision was made for an applicant who cared for her mother, but on the basis that the daughter had ‘no sufficient or reasonably secure income, or capacity to provide such an income because of her limited education and lack of any academic or vocational skills’. Care provided by one child for another was taken into account in the case of in the Goods of JH,
deceased, although of course care provided by a non-applicant may prejudice a claim.

Care can apparently be a relevant consideration in both England and Ireland when assessing the extent of the deceased’s obligation towards the applicant. But it seems that it will rarely be the sole, decisive factor, and that it will usually have to be combined with future need in order to justify provision. Admittedly, the case for relief is probably strongest where a carer does have needs generated by care undertaken in the past. Moreover, the approach of the courts is unsurprising. Even in New South Wales, for example, where carers are explicitly recognised among the categories of applicant for family provision, need remains a highly significant factor. Nevertheless, as argued above, the current approach in England and Ireland may not attach an appropriate value to the care itself, particularly if a shift towards ‘desert’ is considered appropriate. The present effect of care on the obligations of the deceased is unlikely to be sufficient to enable the encouragement of care through succession law.

3.4. CARE, CONDUCT AND NEGLECT

There is a possibility that care could be taken into account as conduct, which is specified as a relevant consideration in the English Act. Nevertheless, in Re Coventry it was emphasised at first instance that ‘it is not the purpose of the Act to provide legacies or rewards for meritorious conduct’, and conduct is more likely to be considered in a negative sense.

Negative conduct of the applicant directed towards the deceased is undoubtedly relevant in both England and Ireland, although it will not necessarily preclude a claim. A related question is the effect of neglect on a moral obligation that would otherwise be present, and the courts have been surprisingly generous to neglectful claimants in some cases from England and Northern Ireland. Such generosity is inconsistent with the positive recognition of care.

144 [1984] IR 599.
146 Among the eligible applicants are parties to ‘close personal relationships’ (Succession Act 2006 (NSW), s 57(f)). These are defined as relationships ‘between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care’ (s 3(3)).
147 See, eg, Jurd v Public Trustee [2001] NSWSC 632.
148 Inheritance Act 1975, s 3(1)(g).
150 Re J McD; P McD v MN [1999] 4 IR 301.
In *Espinosa*, the first instance judge was influenced by the fact that the applicant’s commitment to her father dwindled, implying that a failure to care for a deceased parent may have a negative effect on a claim under the Act. Even though the Court of Appeal made an order on the basis of her need and the promise made to her, Butler-Sloss LJ admitted that the daughter’s eventual neglect of her father could have counted against any obligation owed to her because of her care.151

A potentially inconsistent conclusion was drawn by Judge Norris QC in the extraordinary case of *in re Land*.152 The applicant in that case had been so neglectful in the care of his mother that he had been convicted of her gross negligent manslaughter, and the forfeiture rule applied to his entitlement under her will.153 Nevertheless, his application under the 1975 Act succeeded. To allow the forfeiture rule to govern the matter and preclude such a claim, in the view of Judge Norris QC, would:

… deprive […] the one person who devoted himself to the deceased’s care without significant outside support (albeit that he lapsed at the end) of the benefit she intended for him and confer […] it upon remote relations most of whom did absolutely nothing for her.154

He was influenced by the fact that the applicant’s situation had been one of ‘inadequacy’, a failure to recognise that inadequacy and a ‘hesitancy’ to ask for outside help, towards which Judge Norris QC appeared to be sympathetic.155 Most importantly for present purposes, the judge accepted that the deceased recognised an obligation towards the applicant. He also refused to hold that that the applicant’s conduct had a disentitling effect. While it was said to be correct that the applicant should be punished through criminal proceedings and by being deprived of the full legacy that his mother had left him, the judge was reluctant to impose a further penalty by denying reasonable financial provision.

A less extreme example of neglect was at issue in the Northern Irish case of *Re McKernan (deceased)*.156 Deeny J recognised that ‘the plaintiff daughter was not a dependable provider of care to the mother and was viewed by [the deceased]… as lazy’.157 This was not considered to justify a total lack of provision for the daughter

152 [2006] EWHC 2069 (Ch).
153 According to section 1(1) of the Forfeiture Act 1982, this is ‘the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing’. The equivalent rule in Ireland, which precludes an application for family provision, is contained in s 120 of the Succession Act 1965.
154 [2006] EWHC 2069 (Ch), at [24].
155 [2006] EWHC 2069 (Ch), at [27].
157 [2007] NIch, at [37].
under the mother’s will, although ‘it could justify a distinction being drawn’ between the applicant daughter and her siblings.158

The judicial sympathy bestowed on applicants in some ‘neglect’ cases is laudable. Nevertheless, it undermines the significance of care where it is in fact provided, and arguably results in injustice similar to that which can be caused by ‘lame duck’ cases.

3.5. THE SIGNIFICANCE OF A PROMISE OF PROVISION

As mentioned above, adult offspring may bring a claim based on the equitable doctrine of proprietary estoppel to enforce an oral, and otherwise generally unenforceable, promise of testamentary entitlement coupled with detriment such as care work. Indeed, in many cases, an estoppel claim would be more advantageous to the claimant because the remedy awarded will be affected by the value of what was promised and the extent of the applicant’s detriment rather than the applicant’s need for maintenance.159 But such a promise can be significant in the context of family provision claims, and in England the two claims are often addressed in the same proceedings.160

As we have seen, in the particular circumstances of Espinosa, a promise made by the deceased father to leave to the applicant property that he originally inherited from his wife was a weighty consideration for the purposes of the 1975 Act, although it does not appear to have been related to the care provided by the daughter for the father. Express or implied promises to benefit the applicant are examples of situations where a moral obligation is likely to be found in England,161 but it may be the promise rather than any care provided that is crucial.

That said, the significance of a combination of a promise and work has been recognised in several cases. A promise was said to generate a moral obligation in Re Pearce, which involved a son who was promised that he would inherit a farm on which he had worked for a number of years,162 and in the ‘child of the family’

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158 [2007] NICCh, at [37].
161 Re Goodchild (Deceased) and Another [1996] 1 FLR 591. For an account of the similarities between cases involving the 1965 Act and constructive trusts in Ireland, which have some features in common with proprietary estoppel, see A. Keating, ‘The Moral Duty and “New Model” Constructive Trusts’ (2007) 12 CPLJ 79.
162 [1998] 2 FLR 705.
In Re Abram,\(^{164}\) it was found that the ‘case for moral obligation or special circumstances’ remained ‘overwhelming’ because the applicant worked in the family business for a significant period for low pay in the belief that it would be his, even though he eventually left through ‘force majeure’.\(^{165}\)

Similar conclusions have been reached in several Irish cases, and in \(XC v RT\), Breen J confirmed that:

Special circumstances giving rise to a moral duty may arise if a child is induced to believe that by, for example, working on a farm, he will ultimately become the owner of it, thereby causing him to shape his upbringing, training and life accordingly.\(^{166}\)

In \(PG v RSG\),\(^{167}\) the judge found that the applicant was encouraged to believe that the family farm on which he had worked since the age of 14 would be his, and discouraged from leaving home when he married. It was found that the deceased’s equal treatment of the applicant as compared with his two siblings did not constitute proper provision.\(^{168}\)

There is little to stop the reasoning in the farm cases from being applied to scenarios involving care work, and Keating contemplates this possibility in Ireland.\(^{169}\) Indeed, identical principles have been applied to English cases involving farm labourers and carers in the context of proprietary estoppel.\(^{170}\) Some would argue that the injustice is greatest where the deceased makes a promise of provision but fails to honour it. But if family provision law is to be used to support and encourage care, it seems likely that claims would have to be feasible even in the absence of a promise of provision made by the deceased.

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\(^{163}\) [1996] 1 Ch 226.

\(^{164}\) [1996] 2 FLR 379.

\(^{165}\) [1996] 2 FLR 379, at 394.

\(^{166}\) [2003] 2 IR 250, at 263.

\(^{167}\) [1980] ILRM 225. See also \textit{In the Goods of Breen (Deceased), Breen and Kennedy v Breen and others}, unreported, High Court, 5 May 1995.

\(^{168}\) The fact that a farm has been promised to someone other than the applicant is also relevant: \textit{Re JH de B; I de B v HE de B and others} [1991] 2 IR 105.


4. CONCLUSIONS AND SCOPE FOR DEVELOPMENT IN THE LAW

It has been suggested in this chapter that family provision could legitimately be used to support, encourage or reward care provided by adult children to a now-deceased care recipient. But it has also been recognised that the approach of the relevant legislation in England and Ireland and the courts’ interpretation of it is not entirely fit for that purpose at the present time.

Kerridge has pointed out that claims by adult children under the Inheritance (Provision for Family and Dependants) Act often occur in distinctive circumstances. It can therefore be difficult to isolate the precise reasoning of the court in a given case. Care provided is often mentioned by judges, but it can be unclear what (if any) effect it has of itself on the result. This state of affairs is inevitable given the focus on maintenance that pervades the Act.

In its recent consultation paper on intestacy and family provision, the Law Commission of England and Wales invited consultees’ views on whether and how adult children should be given a greater chance of success in claiming under an amended 1975 Act. But the Commission expressed understandable concern that it would be ‘difficult to find a justification for doing so that was both clear, and consistent with the rest of the law’, particularly if the maintenance limitation were removed. As a result, it provisionally recommended no change, but perhaps the provision of care would be a viable addition to the factors taken into account.

In Ireland, there is arguably greater scope for judicial innovation to recognise care in itself because of the lack of an express ‘maintenance’ limitation in the Succession Act 1965 and the seemingly more generous approach in general, but such innovation may not be forthcoming. Statutory reform, on the other hand, has tended to focus on claims by same-sex couples and unmarried cohabitants.

Of course, if an award in favour of a caring adult son or daughter is to be recognised in itself and without a requirement to demonstrate loss or need, the basis and measure of relief would have to be addressed and that is unlikely to be a straightforward task. One example that may be of assistance is the New Zealand Law Commission’s idea of a ‘contribution claim’ for children and others who are

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not in need but have contributed to the deceased in some way. The proposal, made in the context of a discussion about the limitations of the ‘promise’ requirement in the New Zealand testamentary promises legislation, would allow an applicant to claim ‘an appropriate award in respect of their unremunerated services for the will-maker’ where, inter alia, ‘it is unjust for the estate of the deceased to retain the benefit without provision being made for the contributor’. The availability of a claim based on unjust retention would be subject to a number of specific limitations, which were clearly influenced by principles of the law of unjust enrichment. The remedy would usually be to the ‘value of the benefit’ conferred in the absence of an express promise, but the court would be given a discretion to consider other factors. There is an inevitable degree of imprecision surrounding the practical operation of the New Zealand Law Commission’s proposal. But it does demonstrate that it is at least possible to formulate provisions under which adult offspring who provide care could claim a share in a parent’s estate by virtue of the benefit conferred.

Many of the issues raised in this chapter will cause disagreement, not least because of the varied philosophies governing succession law throughout Europe. But as welfare states face the challenge of an ageing population, perhaps both common law and civil law jurisdictions should consider the possibility of using succession law to recognise and encourage care.