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Family Provision and Family Practices - The Discretionary Regime of the Inheritance Act of England and Wales

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Abstract

This paper examines the discretionary 'family provision' jurisdiction in England and Wales. It considers how the criteria governing eligibility to make a claim, and the principles and rationales underlying the exercise of the court's powers, shed light on what we understand as 'family' relationships and the fluidity between family structure and family practices. It argues that the law can and does operate dynamically and responsively to determine which kinds of relationships and what qualities of emotional or supportive bonds, should be recognised as giving rise to a 'sense of obligation' to provide financial support after a death in the family.

Key words

Inheritance; family; discretion; norms; practices; England and Wales

Resumen

Este artículo analiza la jurisdicción las "provisiones familiares" discrecionales en Inglaterra y Gales. Considera que los criterios de elegibilidad para presentar una reclamación, y los principios y razones que subyacen bajo el ejercicio de los poderes del tribunal, arrojan luz sobre lo que entendemos como relaciones "familiares" y la fluidez entre la estructura familiar y las prácticas familiares. Se argumenta que la ley puede, y de hecho opera, de forma dinámica y responsable para determinar qué tipo de relaciones y qué cualidades tienen los vínculos emocionales o de apoyo, y se debe reconocer que genera "un sentido de obligación" de prestar apoyo financiero después de una muerte en la familia.

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Palabras clave

Herencia; familia; discreción; normas; prácticas; Inglaterra y Gales

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1. Introduction

> The difficulty, of course, is to discover a system sufficiently elastic to enable a testator to disinherit his undeserving family, while yet preventing an unjust father or an unfaithful husband from leaving his dependants penniless. (Keeton and Gower 1935, p. 329)

This paper argues that the discretionary 'family provision' jurisdiction in England and Wales is at the forefront of dealing with the problems the law faces in squaring the traditional conception of what constitutes a family and what constitute appropriate family rights and obligations, with a radically changing social and attitudinal landscape in which 'new' forms of family life and family behaviour are increasingly prominent. It suggests that the eligibility criteria of the jurisdiction, coupled with the principles and rationales underlying the exercise of the discretion it bestows on the courts, can be understood as delineating what we understand as 'family' relationships, and shed light on the fluidity between ideas of family 'structure' and family 'practice'. In so doing, it draws on the work of David Morgan in emphasizing the importance of recognizing the family as that which is constituted by 'doing' rather than 'being', and of Janet Finch in determining the nature of 'obligation' between family members. Thus, what has been described elsewhere as the 'inheritance family' (Douglas *et al*. 2011) – those family members (or others) who are recognized within the group, including by the deceased, as appropriately having an entitlement to share in a person's estate - is shaped by notions of obligation, commitment and 'appropriate' familial behaviour, which are determined both by the moral and cultural values underpinning the statute and case-law and by the individual circumstances operating in particular families and between particular family members.

The paper begins by providing a brief description of what Morgan (2011) has in mind in referring to 'family practices', and Finch's (1989) conclusions on how family obligations are recognized, and then gives an outline of the family provision jurisdiction in England and Wales. It shows how ideas of family structure and family behaviour are both used to determine the eligibility rules which delimit the range of 'family' relationships recognized as giving rise to a claim. It goes on to examine the orders that can be made and the factors taken into account through a discussion of the key case-decisions which elaborate the statutory provisions. I hope to show through this examination of how inheritance law is applied by the courts the light it can shed on our understanding of what constitutes 'family' in late modern society, and thus seek to move it from the periphery of family law scholarship closer to its core.

2. Theorizing the family – family 'practices' and family obligations

It has long been accepted by scholars of 'the family' that the term itself is a contested one. We are familiar with the limitations of viewing the family as a formal or structural entity, demarcated by legal ties or traditional kin bonds. Yet the 'functional' view of the family is also problematic, since a focus on function risks failing to establish any boundaries at all between what is described as pertaining to the family and what could equally be classed as intimacy, friendship or affect. David Morgan's work goes some way to meeting these objections. Morgan offers the concept of 'doing family', or of 'family practices' as a way of theorizing about family life (rather than constructing a theory of the family). He suggests that we avoid using the word 'family' solely or primarily as a noun, but think of it instead as an adjective – 'as a lens through which to describe and to explore a set of social activities' or even think of it as a verb. For Morgan (2011, p. 5-6), a 'focus on doing, on activities, moves us away from ideas of the family as relatively static structures or sets of positions or statuses.' In developing this approach, he draws upon Bourdieu, who also contrasted formal kinship rules ('a language of prescriptions and rules') with 'practical kinship' – shaped by practical and everyday concerns and considerations (Bourdieu 1990, p. 163, 168). Thus, Morgan concludes

(2011, p. 163), 'family practices are reflective practices; in being enacted they simultaneously construct, reproduce family boundaries, family relationships and possibly more discursive notions of the family in general.'

This approach, focusing on what people do as part of their lived family experience, whom they regard as part of 'their' family, and how that impacts on their behaviour towards them, is helpful in explaining how and *why* statute and case-law governing family provision are articulated as they are. It enables us to demarcate who counts for the purposes of family provision as 'family' and what is the nature and extent of the obligation that may be imposed in consequence. However, it is important to note that this is not, and cannot be, a purely subjective investigation into particular individuals and their families. Clearly, the law has to lay down rules and guidelines to apply in general. Thus, as Morgan understands, there are 'various ways in which law and family are intertwined, with the law, to some extent, reflecting widespread assumptions about family roles and responsibilities while, at the same time, also shaping and influencing these everyday domestic practices.' (Morgan 2011, p. 28).

In empirical work which included the scrutiny of practices and attitudes concerning inheritance, Janet Finch found that assistance, including financial support, from relatives is of considerable importance to many people, but that it is unpredictable in the sense that it cannot be assumed (or presumed) that in any given relationship (e.g. father and daughter), support will be provided. The 'appropriateness of offering a particular type of assistance is something to be weighed up and judged in particular circumstances, and to be negotiated between the parties concerned.' (Finch 1989, p. 239)

Finch also argues that the principle of reciprocity:

> is the key to understanding how patterns of support build up over time. An expectation that assistance should flow in two directions, and that no one should end up in a position where they are receiving more than they are giving, is at the heart of many of the negotiations which take place about support in families (Finch 1989, p. 240).

We will see that, in deciding whether a claim for family provision should be upheld, the principle of reciprocity is not straightforward. On the one hand, the legislation appears to require a distinct *lack* of such reciprocity to justify a claim; on the other, in exploring how judges actually decide on the merits of a case, the extent to which care and support were mutually exchanged may appear a significant factor.

Finch goes on to identify a 'sense of obligation' as the key defining characteristic of family ties, but it is an obligation derived from normative guidelines concerned with *how to work out what to do,* rather than laying down *what should be done*. Moreover, it depends upon the nature of the relationship between the individuals concerned, derived from the commitments they have built up over time. Again, this is helpful in explaining why judges conclude that some claims should succeed, and others fail, in the light of the behaviour and emotional quality of the relationship between the claimant and the deceased.

3. The Inheritance (Provision for Family and Dependants) Act 1975

> By the law of England everyone is left free to choose the person upon whom he will bestow his property after death entirely unfettered in the selection he may think proper to make. He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued.[1]

As is well known, English law permits complete freedom of testation (subject to rules regarding capacity, formalities, undue influence etc), though such freedom

[1] *Boughton v Knight (1873) LR 3 P&D 64 per Sir James Hannen P.*

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does not date back as far as is often thought – only to the beginning of the 20th century (Keeton and Gower 1935, Dainow 1940, Green 1988).[2] As Melanie Leslie has noted, the apparently dominant principle of testamentary freedom may in fact be heavily circumscribed by courts 'committed to ensuring that testators devise their estates in accordance with prevailing normative views' (Leslie 1996, p. 236). Disposition of assets on death has a moral and social as well as an economic purpose, and probate law can be used to promote norms which reflect and endorse those relationships (particularly 'family' relationships) which are deemed worthy, and dismiss or reject those regarded as less deserving or desirable. Where the jurisdiction concerned provides a statutory remedy for disinheritance – as is the case in England and Wales – these norms can be promoted through an appropriate claim. But where, as in the USA, there is no such remedial jurisdiction, courts may be more particular about finding defects in the form of a will which would serve to nullify it, or readier to uphold claims of undue influence, where the will appears to ignore or reject the testator's moral duty to those 'whom the court views as having a superior moral claim to the testator's assets' (Leslie 1996, p. 237). The intestacy rules provide another illustration of the promotion of particular moral and social norms in delineating who is regarded as deserving of a share in an estate.

In England and Wales, a person who regards herself as unfairly treated either under a will or through the operation of the intestacy rules may make a claim under the Inheritance (Provision for Family and Dependants) Act 1975 Act, if she fits within the eligibility criteria (Green 1988, Matthews 2009). The introduction of a discretionary regime (originally in 1938), rather than the application of forced shares, fits an approach to succession which focuses on the individual merits of a claim – the underlying rationale is one of remedying *hardship* rather than upholding *justice* and, like the English financial remedies jurisdiction on divorce, it values the flexibility to provide individualized outcomes[3] over prior recognition of 'entitlement' or certainty. Dainow (1940, p. 350) explains that the rationale behind the original legislation was to relieve the plight of widows and children otherwise unable to support themselves. He comments, in relation to the collection of evidence by a joint parliamentary committee in the 1930s, that 'the most emphasized idea in favour of the restriction was the one of providing subsistence rather than the right to a fair share of common property.'

Moreover, as is typical in English family cases, the use of discretion on the part of the court to remedy the situation leads to a focus on 'facts' in the particular case. As an experienced practitioner has put it, 'There is no single essential factor for the success, or failure, of a claim … All facts may be relevant.' (Francis 2012, p. 1247). This helps explain why an analysis utilising a family practices approach, which examines what the court identified as the 'familial' quality of the emotional and behavioural relationship between claimant and deceased in the given case, may be more fruitful in helping explain the decisions reached than one relying instead on a structural model, focused on the formal ties between claimant and deceased, or even a functional model, which, as noted above, may fail to distinguish between actions taken consciously as a 'family' member and those taken as a friend or carer.

3.1. Eligibility to make a claim

The range of those eligible to apply under the jurisdiction is limited, and tied, to an extent, to traditional ideas of the 'family' as constituted by marriage and kinship (Sloan 2011). However, as will be shown, the notion of 'dependence' provides a

[2] Keeton and Gower (1935) suggest that the introduction of some sort of fixed share or 'family provision' law (as we would now call it) would reflect the extension into English law of Roman law principles at that time exemplified by the passage of the Legitimacy Act 1926 (which enabled the legitimation of children born out of wedlock if their parents subsequently married) and the Adoption of Children Act 1926 (which permitted the legal adoption of children for the first time in English law).

[3] But see the differing parliamentary views on the merits of judicial discretion in this area, noted by Green (1988, p. 195).

lens through which the law can reflect an understanding of family which emanates from the importance attached to what people have 'done', how they have 'behaved' towards one another and what they 'owe' to each other, rather than what position they occupy within a (formal) family structure.

The following may make an application for provision under s 1(1) of the Act:

- the spouse or civil partner of the deceased;
- a former spouse or civil partner (provided they have not formed a subsequent marriage or civil partnership);
- a person who, during the whole of the period of two years immediately before the death of the deceased, was living in the same household as the deceased as his or her husband or wife, or civil partner;
- a child of the deceased;
- any person who in relation to any marriage or civil partnership to which the deceased was at any time a party, or otherwise in relation to any family in which the deceased at any time stood in the role of a parent, was treated by the deceased as a child of the family[4];
- a dependant, defined as any person who, immediately before the death of the deceased, was being maintained, either wholly or partly, by the deceased.

There are some points worth noting in this list. First, parents or siblings are not included as discrete categories of eligible applicant, perhaps because they are not assumed to have been dependent upon the deceased. This is in contrast to the intestacy rules, where they will take (in that order of priority) if the deceased has no surviving spouse or descendants.[5] Public attitudinal research (Humphrey *et al*. 2010, Ch 4) conducted for the Law Commission of England and Wales when they were reviewing the law between 2009 and 2011 showed a strong preference for the surviving partner (married or not) and descendants of the deceased over parents and siblings, but a recognition of the latter as having claims in the absence of a spouse or children where there was felt to be a need for support (in the case of elderly parents) or a wish to pass property down the generations via a sibling and his or her offspring. The possibility of a parent or sibling seeking family provision provided they can show they were dependent on the deceased would appear compatible with such attitudes.

Secondly, any child of the deceased – adult or minor, dependent or independent - may apply. Under the forerunner of this Act, only minor children, unmarried daughters, or adult children with disabilities, i.e. those assumed to be dependent on the deceased, were eligible. The Law Commission considered that it was discriminatory to restrict provision to adult daughters but not sons, noting that both might face economic hardship which could be relieved from the deceased's estate.[6] But the extension to all children of the deceased does not mean that the jurisdiction is now used to ensure 'equal shares' amongst potential child beneficiaries, which, empirical evidence demonstrates, is an important value held by the public when considering how children should be recognized (Humphrey *et al*. 2010, p. 33). As I discuss later, adult children may still find it difficult to obtain a share of the estate under this jurisdiction, on the basis that if they are in fact financially independent they are thus not in *need* of provision from the deceased, and the underlying rationale of relieving hardship will not be satisfied.

[4] As amended by the Inheritance and Trustees' Powers Act 2014 Sch 2 para 2.
[5] Administration of Estates Act 1925 s 46. In fact, a parent or sibling will take part of the estate if there is a surviving spouse/civil partner but no issue, once the 'statutory legacy' has been apportioned to that spouse/partner.
[6] Law Commission (1974) paras 71-79.

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Another significant difference between the family provision regime and the current intestacy rules is the specific inclusion in the Inheritance Act jurisdiction (since 1995) of cohabitant partners of the deceased if they lived together for at least two years. Indeed, the Law Commission in 1989 justified the *exclusion* of cohabitants from automatic provision under the intestacy rules by noting that they could be better catered for under the discretionary jurisdiction which could more easily determine whether the couple had been cohabiting 'as husband and wife'. Under their more recent proposals, the Law Commission (2011, Ch 8) has now recommended their inclusion in the light of very strong public support for this (Humphrey *et al*. 2010 pp 42-47). One might expect some reduction in the number of family provision claims should their recommendations be enacted,[7] but given the controversial nature of cohabitation law reform, this may not be in the very near future so the eligibility to make a claim will remain important for some time to come.

Spouses, civil partners, cohabitants and children of the deceased all fit recognizably into the standard nuclear family model, albeit one that has been updated to take account of the acceptability of both cohabiting and same-sex relationships in late modern society, and this closely reflects the social attitudes found in the public opinion survey mentioned above (Humphrey *et al*. 2010, p. 86; Douglas *et al*. 2011, pp. 254-256). A child 'treated by the deceased as a child of the family' means a step-child, and this category therefore provides a further recognition of an updated family model which may embrace children who are not the deceased's 'own' but to whom he or she has stood in the social or psychological position of parent (Humphrey *et al*. 2010, pp.59-60).

3.2. Dependency as a basis for eligibility

It is the final category, however, which represents most strongly the acknowledgement that claims may be made not on the basis of position within a family structure but by virtue of the familial behaviour and practices shared between the deceased and the applicant. As noted, a person may apply for provision if, immediately before the death of the deceased, he or she was being maintained, either wholly or partly, by the deceased. The key criterion is the *maintenance* of the applicant by the deceased. This marks out that, in contrast to Finch's finding of the importance of reciprocity in shaping family support, what the law is interested in is a relationship of asymmetrical *dependence* which echoes traditional assumptions about the nature of family relationships: the applicant has to show that they 'received' more from the deceased, than they put into the relationship. (But it will be noted below that, when it comes to assessing what, if any, provision should be made for the applicant, his or her contribution to the relationship then becomes relevant). As section 1(3) of the Act states, the applicant will be regarded as having been maintained by the deceased *only* if the latter had been making a substantial contribution in money or money's worth towards his or her reasonable needs other than a contribution made for full valuable consideration pursuant to an arrangement of a commercial nature.[8] This underscores the centrality of hardship and dependency as the relevant factors in an inheritance claim.

This is well illustrated by the leading case, *Jelley v Iliffe.*[9] The applicant, a widower, moved in with the deceased, who had been his wife's sister-in-law, and they lived together for a number of years (the applicant could not at that time apply on the basis of their 'cohabitation' but it was accepted that they probably had lived 'as man and wife'). The deceased's husband had left the matrimonial home to her under a life interest under his will, with their children inheriting it on her death, but

[7] Compare Law Commission (2009) para 4.15.
[8] As amended by the Inheritance and Trustees' Powers Act 2014 Sch 2 para 3.
[9] [1981] Fam 128.

a 'deed of arrangement' had been made under which the children had transferred the legal title to her on her undertaking to leave it to them on her death. This she duly did, and the applicant then applied for provision as her dependant. Stephenson LJ held:

> To discover whether the deceased was making [a substantial] contribution the court has to balance what she was contributing against what he was contributing, and if there is any doubt about the balance tipping in favour of hers being the greater contribution, the matter must, in my opinion, go to trial. If, however, the balance is bound to come down in favour of his being the greater contribution, or if the contributions are clearly equal, there is no dependency of him on her, either because she depended on him or there was mutual dependency between them, and his application should be struck out now as bound to fail.[10]

This is not a straightforward exercise: it entails the making of moral or value judgments, or, as the Court of Appeal preferred to say, using 'common sense':

> The balancing of imponderables like companionship and other services, on which the court has somehow to put a financial value, against contributions of money or accommodation, is a hard task … In striking this balance the court must use common sense and remember that the object of Parliament in creating this extra class of persons who may claim benefit from an estate was to provide relief for persons of whom it could truly be said that they were wholly or partially dependent on the deceased. … Each case will have to be looked at carefully on its own facts to see whether common sense leads to the conclusion that the applicant can fairly be regarded as a dependant.[11]

This 'balance sheet approach' has been criticised as it requires the applicant's contribution to be less than that of the deceased if he or she is to be able to claim, and it fails to recognise *inter*dependency: as Kerridge and Brierley (2009, para 8.79) have put it, 'It does seem odd that an applicant who claims to have been a dependant will benefit from demonstrating that he or she was slothful and uncaring'. Stereotyping is perhaps less obvious nowadays than it was when this case was decided, 30 years ago, but then, the applicant's own role in 'rendering services by looking after the garden and being a man about the house, doing various odd jobs and some internal decoration' was contrasted with the deceased's 'doing the cooking and cleaning'.[12] Bound up in these judgments is an assumption of what people 'do' for each other in intimate or family relationships. Indeed, the comparison of the housewife role with that of the paid housekeeper demonstrates very clearly the assumption of altruistic caring which lies at the heart of the role of 'partner' (or at least, 'female' partner).

Mirroring the explanation by Leslie (1996) of American decisions on the validity of wills, noted above, the camouflaging of the moral judgments implicit in the jurisdiction is also accomplished, as has been pointed out by Kate Green (1988, p. 200), through resort to somewhat technical interpretation of the statute. For example, it has been unclear if it must be established that not only was the deceased making payments or otherwise providing financial benefits to the applicant (e.g. providing accommodation),[13] but that he or she had also 'assumed responsibility' for doing so, that is, that the deceased had recognized he or she had an obligation to do so.[14] Such 'assumption of responsibility' is a relevant factor in determining *what* provision should be made, assuming the claimant is eligible, but the question of whether it is relevant to determining such eligibility has been

[10] *Jelley v Iliffe* [1981], p. 138.
[11] *Jelley v Iliffe* [1981], p. 138E (per Stephenson LJ) and p. 141 (per Griffiths LJ), emphasis added.
[12] *Jelley v Iliffe*[1981] Fam 128 at pp. 142-143.
[13] *Bishop v Plumley* [1991] 1 All ER 236, CA; *Graham v Murphy* [1997] 1 FLR 860 (male cohabitant living in deceased's house at her expense); *Rees v Newbery and the Institute of Cancer Research* [1998] 1 FLR 1041 (applicant living in flat owned by the deceased at substantially below the market rent).
[14] *Re Beaumont* [1980] Ch 444.

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unclear. In *Jelley v Iliffe,* Court of Appeal held that it can be *presumed* from the *fact* of maintaining the applicant.[15]

In *Baynes v Hedger*[16] this was taken to mean that such assumption of responsibility *must* be established to found eligibility (thus perhaps respecting testamentary freedom by enabling a testator to preserve the estate from a claim by declining to assume responsibility towards the potential claimant) and there, the presumption was rebutted (Monk 2011, pp. 241-243). A successful sculptor had a forty-year close relationship with another woman, although they lived separately for most of that time, and the woman had several children. The sculptor was financially generous to both the woman and her children over the years, and provided extensive support to one child in particular, her god-daughter, purchasing a flat for her and paying off a series of large debts. After several years, she told the god-daughter she would no longer help her other than by way of loans. The god-daughter pressed her to make provision for her in her will, but at the time of her death, she had not done so other than by way of a small legacy, specifying that the god-daughter had already benefited and should receive no further provision. She left the family landed estate to a charity and the god-daughter made a claim under s 1(1)(e). The Court of Appeal allowed the charity's appeal against the trial judge's finding that the god-daughter was eligible to claim.

In so doing, the Court affirmed the approach of the first instance judge in assessing both how far the deceased had shown an 'assumption of responsibility' towards the applicant, and the nature of the conduct of the applicant towards the deceased. In conducting this assessment, both courts applied understandings of what a familial relationship consists of. For example, they found that the deceased

> was a *quasi-parental figure* to all of her partner's children and exerted a dominant role within their family. …She showed *considerable generosity* to each of them.[17]

The applicant

> went to see [the deceased] …, at the suggestion of a friend, in order to encourage [her] *to take responsibility for [the applicant] as a parent would*.[18] (emphasis added).

The very term, 'god-daughter' of course implies a quasi-familial role and relationship between the deceased and the applicant.

On the other hand, in rejecting the first instance judge's conclusion that she was being 'maintained', the Court of Appeal gave weight to the evidence that the applicant's repeated calls for assistance on the deceased led her to adopt a different approach, with the sums of money she provided increasingly described as 'loans' rather than 'gifts'. At first instance, the judge noted as 'distasteful' the applicant's argument now that these were 'soft loans', meaning loans without interest, which would never be enforced, and were, to the deceased's knowledge, unlikely to be repaid,[19] when she had protested at the time to the deceased that 'she did not want gifts or handouts and that she intended to repay'. He concluded that her behaviour was 'not conduct which, in my judgment, should be rewarded.'[20] We can see from such dicta that the courts' conception of what would have been an *appropriate* relationship between the god-daughter and the deceased would have

[15] *Jelley v Iliffe* [1981] Fam 128, 137. They therefore reinstated the applicant's claim, which had been struck out, without deciding on the facts whether it succeeded or not. The Law Commission (2011, para 6.59) recommended that it be made clear that the assumption of responsibility need not be proved in order to be eligible to claim, although it should continue to be a relevant factor in assessing whether there was a failure to make reasonable provision and if so, what provision should be made. This has been done by the Inheritance and Trustees' Powers Act 2014 Sch 2 para 5(4).
[16] *Baynes v Hedger* [2009] EWCA Civ 374, [2009] 2 FLR 767 at [46].
[17] *Baynes v Hedger* [2009] EWCA Civ 374, [2009] 2 FLR 767 at [10].
[18] *Baynes v Hedger* [2009] EWCA Civ 374, [2009] 2 FLR 767 at [16].
[19] *Baynes v Hedger* [2009] EWCA Civ 374, [2009] 2 FLR 767 at [36].
[20] *Baynes v Hedger* [2009] EWCA Civ 374, [2009] 2 FLR 767 at [49].

been based on grateful acceptance on the part of the god-daughter rather than a sense of entitlement.

4. Reasonable provision

Once eligibility is established, the court is then required to undertake a two-stage exercise. Under sections 2(1) and 3(1) it must first determine whether the deceased's will or the law relating to intestacy made reasonable financial provision for the applicant.[21] If it is found that reasonable provision was not made, the court will then go on to decide what, if any, orders to make in order to afford such reasonable provision. But while the courts might expect the applicant to be 'deserving' (as the applicant in *Baynes v Hedger* was *not*), it is not the purpose of the Act merely to enable the court to provide legacies or rewards for meritorious conduct.[22] In considering how the courts evaluate the question of what is *reasonable* provision, we can again see the application of notions and judgments regarding appropriate family behaviour and resulting obligation. As the Court of Appeal stressed in *Ilott v Mitson,* what is required is a 'value judgment' or 'qualitative decision' by the judge.[23]

As is common in the discretionary family jurisdictions, the Act employs a checklist approach in section 3 to how the court is to determine whether reasonable financial provision has been made. The list of factors relevant to all applications is as follows (section 3(1)):

(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;

(b) the financial resources and financial needs which any other applicant for an order … has or is likely to have in the foreseeable future;

(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;

(d) any obligations and responsibilities which the deceased had towards any applicant for an order … or towards any beneficiary of the estate of the deceased;

(e) the size and nature of the net estate of the deceased;

(f) any physical or mental disability of any applicant … or any beneficiary of the estate of the deceased;

(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

This list is, on one level, value-neutral. It does not tell the court whether the financial needs of the applicant should carry more weight than the resources of other beneficiaries; it does not suggest that the obligations owed by the deceased outweigh the conduct of the applicant towards him or her. On the other hand, it is only value-neutral up to a point, since it could have included other factors in which different values would have been implicit: for example, it could have referred to the closeness (defined either in kin or emotional terms) of the relationship between the claimant and deceased, or to the extent to which the claimant had him or herself maintained the deceased or provided other support. What it does do is enable the court to consider the circumstances of the deceased, the claimant, and the beneficiaries in the round, providing scope to contrast the relationship between the deceased and the claimant with that which he or she enjoyed with other family members. Where the estate is left to charity, as in *Baynes v Hedger,*[24] the court's

[21] For a clear example of failure to make *reasonable* provision, see *Hanbury v Hanbury* [1999] 2 FLR 255 (county court) where the deceased bequeathed his seriously disabled daughter by his first marriage only £10,000 whilst his second wife had assets of over £260,000.

22 *Re Coventry* [1980] Ch 461 at 486 and 495.

[23] [2011] EWCA Civ 346, [2012] 2 FLR 172 at [27].

[24] See also *Ilott v Mitson*[2011] EWCA Civ 346, [2012] 2 FLR 172 discussed below.

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consideration of the checklist also enables the inclusion of social and cultural norms of family obligation to assess whether the claimant's circumstances should outweigh the testator's freedom to bequeath property outside the family entirely.[25]

The cases on the application of these factors fall into three main categories, all highlighting tensions between traditional and more modern ideas of family and all demonstrating how family structure interacts with family practice in identifying the scope of legal recognition of claims on the deceased's estate.

The first are cases concerning disputes between surviving spouses and children (very often of a former relationship) or other blood relatives of the deceased. Here, the well-known competition between the claim of the surviving spouse and those of 'issue' or 'kin' highlights the shift towards giving priority to the widow/er in western inheritance laws, and the dilemma that the growth in multiple families from different relationships creates in doing justice as between the spouse and such children (Castelain *et al*. 2009).

The second category concerns similar claims by cohabiting partners; English law currently fails to recognize the cohabitant as entitled automatically to a share in the estate despite many cohabiting relationships being the functional equivalents of marriage. The discretionary jurisdiction provides a means of providing such recognition pending full acknowledgement of cohabitation through the intestacy rules.

The third involves claims by adult children, some of whom have been characterized by Kerridge and Brierley (2009, para 8.62) as 'lame ducks', who, despite their adulthood, have either failed to achieve successful financial independence or who have become estranged from the deceased but claim that they should have been 'remembered' or included in the disposition of the estate. *Baynes v Hedger,* of course, is a case of this type, albeit that the 'child' was not a natural child of the deceased.

4.1. Claims by a surviving spouse/civil partner

If the application is made by a surviving spouse or civil partner, reasonable financial provision means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife (or civil partner) to receive, not limited to maintenance.[26] The reason for this is that a surviving spouse or civil partner would normally expect to receive a share of the deceased spouse's estate and it would be anomalous if the court was constrained to give her (or him) less after the other's death than it could on divorce or dissolution. Indeed, under s 3(2), the court is required 'to have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by the death, had been terminated by a decree of divorce' and must consider a range of factors akin to those taken into account in a divorce, such as the duration of the marriage and the 'contribution' made by the applicant to the welfare of the family, including by looking after the home or caring for the family.

But this is not a straightforward exercise. England and Wales has no matrimonial property regime. Property owned or acquired by a spouse or civil partner is held subject to the usual rules of property[27] so that there is no automatic entitlement by one spouse to a share in the property of the other. The provision made on divorce

[25] Social research suggests that charities are given low priority by those making wills. Humphrey *et al*. (2010, Table 3.2) found that only 7% of a sample of 622 respondents who had made a will had included a charity amongst the beneficiaries.
[26] Section 1(2) as amended.
[27] With some very limited statutory exceptions such as a claim to a share in the value of a property where a spouse has contributed to its 'improvement': s 37 Matrimonial Proceedings and Property Act 1970.

is governed by legislation which grants wide powers to the court to exercise a broad discretion to redistribute the ownership or enjoyment of property between the spouses.[28] There is thus a significant difference in the legal starting-point taken to providing for a spouse who has been widowed and one whose marriage is ended by divorce. In the former case, in the absence of a will, he or she may expect to inherit up to the whole estate of the deceased under the intestacy rules,[29] while if a will has been made, he or she could potentially be largely disinherited. In recent years in the divorce jurisdiction, provision for an applicant spouse (usually a wife) has shifted from an award limited to satisfying her 'reasonable requirements' – which fit quite well with the notion of 'reasonable provision' based on relieving need – to one governed by three guiding principles: satisfaction of need, compensation for relationship-generated disadvantage, but also sharing (usually equally) of the marital assets.[30] How far should this principle of sharing operate in the family provision sphere, focused as it is on making only 'reasonable provision' for the surviving spouse or civil partner?

The 'divorce cross-check', as it is known, has been considered in several cases. The leading authority, *Fielden and Another v Cunliffe,*[31] was decided after the principle of fair sharing of assets was established by the House of Lords in *White v White*[32] but before it had been elaborated into the three principles just noted. The wife answered an advert for a housekeeper placed by the deceased, an elderly bachelor. She started work for him almost immediately after being interviewed for the post, and began cohabiting with him two months later. They married four months after that, and he died a year later. He made a will expressed to be in contemplation of his marriage (and therefore not revoked by it)[33], leaving his estate, valued at some £1.4 million, on discretionary trust for the wife, several relatives and friends and employees of the family business. The wife sought a definite share of the estate rather than provision at the discretion of the trustees and so brought a claim. At first instance, the wife was awarded a lump sum of £800,000 and the executors appealed. The Court of Appeal held that the correct approach, following *White v White*, was to apply the statutory provisions to the facts of the individual case with the objective of achieving a result which is fair, and non-discriminatory. But it did not follow that an equal share should result, for the situation is not identical to that of a divorce. As Wall LJ put it:

> A marriage dissolved by divorce involves a conscious decision by one or both of the spouses to bring the marriage to an end. That process leaves two living former spouses, each of whom has resources, needs and responsibilities. … However, where the marriage, as here, is dissolved by death, a widow is entitled to say that she entered into it on the basis that it would be of indefinite duration, and in the expectation that she would devote the remainder of the parties' joint lives to being [the deceased's] wife and caring for him.[34]

On the other hand,

> a deceased spouse who leaves a widow, is entitled to bequeath his estate to whomsoever he pleases: his only statutory obligation is to make reasonable financial provision for his widow. In such a case, depending on the value of the estate, the concept of equality may bear little relation to such provision.[35]

His Lordship thus drew attention to the fact that divorce and death are not equivalent situations as regards the financial position which ensues but he also

[28] Matrimonial Causes Act 1973 Part II.
[29] Administration of Estates Act 1925 s 46.
[30] *White v White* [2001] 1 AC 596;*Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618.
31 [2005] EWCA Civ 1508, [2006] Ch 361 at [30].
32 [2001] 1 AC 596.
[33] Wills Act 1837 s 18(3) (as amended).
34 *Fielden v Cunliffe* [2005] EWCA Civ 1508, [2006] 1 FLR 745 at [30].
[35] *Fielden v Cunliffe* [2005] EWCA Civ 1508, [2006] 1 FLR 745 at [21].

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noted the significance of the principle of freedom of testation which must be recognized to some degree. Without either a matrimonial property regime or a system of fixed shares on death providing the legal backdrop to the application of discretion, the Inheritance Act therefore allows, but also limits how far the court is to accommodate the claim of the surviving spouse. The Court of Appeal concluded that the brevity of the marriage[36] and the fact that the widow had made only a very small contribution to the family wealth were factors militating against equality of division in ensuring 'reasonable' provision in this case and reduced the award to £600,000 – still nearly 45% of the total estate, but the deceased had no children, so the award reflects the priority given by the general public to a spouse over more remote kin, and especially non-relatives (Humphrey *et al.* 2010, Ch 6).

By contrast, *P v G, P and P (Family Provision: Relevance of Divorce Provision)*[37] concerned another housekeeper turned wife. However, the marriage lasted much longer – about 20 years – but there were two children from the deceased's former marriage in competition with the widow over the estate, which was worth some £4.5 million. Again, the deceased left a will establishing a number of discretionary trusts and the defendants conceded that this did not make reasonable provision for the widow. The marriage had been in difficulties and the spouses separated for a few months before an uneasy reconciliation was cut short by the deceased suffering a fall and dying during surgery. So here, the divorce comparison had greater traction than might have been the case after a happy marriage, although the trial judge regarded it as artificial and declined to be constrained by viewing a likely divorce award as representing either a floor or ceiling to what might be ordered under the Inheritance Act jurisdiction.[38] Here, the judge regarded the widow as having made a significant contribution to the welfare of the family, although she was clearly seen as a 'step mother' by the deceased's children of his former marriage, not as their 'mother'. Ultimately, however, the trial judge attached little weight to this issue. She made her order based largely on what she felt the widow required for a comfortable old age and compared the amount this would take (40% of the estate, plus a pension of £90,000 per annum already in payment) with what the children would receive, satisfying herself that they would all do very well.

These cases involved significant assets. A different scenario applied in *Iqbal v Ahmed*.[39] There, the deceased had a son from a former marriage. His wife came from Pakistan to marry him and spoke little English. The marriage lasted 22 years, and she was entirely dependent upon him for financial support, although she had managed to save £3000 from the 'pocket money' he gave her. Shortly before he died, the deceased made a will giving the widow a right to occupy the marital home rent-free, but responsible for all outgoings and repairs, with the son inheriting the legal title. The home was valued at around £115,000, but required some £30,000 of repairs, which the widow could not afford.

The deceased made no other provision for her. He also drafted a 'Memorandum of Wishes' in which he stated that

> … she has not been a loving and caring wife before and during my illness. She also acts compulsively and repetitively and gives me verbal abuse and physical abuse.[40]

The first instance judge summed up the widow's position: 'She has been diagnosed as suffering from depression. Her grasp of English is poor. She has no history of

[36] For another example of the short duration of the marriage affecting the award, see *Lilleyman v Lilleyman* [2012] EWHC 821 (Ch) [2013] 1 FLR 47.
[37] [2004] EWHC 2944 (Fam), [2006] 1 FLR 431.
[38] The Law Commission (2011, para 2.146) recommended that the legislation should make clear that the divorce analogy should not be treated as setting either an upper or lower limit on the award and this has been done by the Inheritance and Trustees' Powers Act 2014 Sch 2 para 5(2).
[39] [2011] EWCA Civ 900, [2012] 1 FLR 31.
[40] For discussion of the significance of the testator's expression of wishes and feelings in a will and related documents, see Hacker (2010).

employment in the UK. She has virtually no earning capacity' and did not appear to be well integrated into the wider society around her. She was somewhat eccentric and inclined to 'compulsive and repetitive behaviour'.[41]

However, while the judge accepted she may not have been easy to live with, he noted that she had cared for the deceased when he was ill and throughout a long marriage, had kept house and cooked for him. It was accepted that the provision was not reasonable, and the Court of Appeal upheld the trial judge's award of a half share in the property, rather than a mere right to occupy for life. Important factors here were the length of the marriage (as opposed to its brevity in *Fielden*) and the deep hostility between the widow and the deceased's son. So here, the widow received an equal share in the marital home (which would be regarded as 'matrimonial property' available for sharing in the divorce jurisdiction) and the ability, through sale, to convert this to capital to provide a 'cushion' for her future needs. The 'deserving' nature of this widow, in the view of the courts, is apparent: despite what the deceased thought about her, she had performed her wifely duties (although it is worth noting that had there been no child, or had the deceased died intestate, she would have inherited the entire estate).

It is interesting to compare the case law with the evidence of public attitudes towards the competing claims of spouses/partners and the children of the deceased from a former relationship. Humphrey *et al.* (2010, Table 5.1) found that, when asked to comment on how the *intestacy* rules should allocate the estate as between these competing beneficiaries, there was stronger support for the widow than the children, with 46% of respondents favouring the widow receiving all or taking priority over adult children, compared with 18% who favoured the children. Just over a third proposed sharing the estate equally between them. Of course, views may differ where the deceased had expressed his wishes regarding the position of the widow through his will; one might expect greater weight to be given to how he deliberately proposed providing (or not) for her in such cases. Nonetheless, the statutory injunction that provision is not limited to 'maintenance', coupled with the courts' approach in applying the divorce cross-check, appear to reflect the public recognition of the claim of a widow to due 'recognition' in inheritance law.

4.2. Claims by a cohabitant of the deceased

For all claimants other than a spouse or civil partner, 'reasonable provision' is limited to maintenance, both in terms of whether such provision was made for them by will or under the intestacy rules, and if not, what provision should now be made. A cohabitant, therefore, despite being found to have lived with the deceased 'as' a spouse or civil partner, is not treated as such when it comes to the court's exercise of discretion. Yet at the same time, the courts do speak the language of 'obligation' in describing the relationship with the deceased – even though no such legal obligation of support exists. Thus, in *Webster v Webster,* which was a cohabitation lasting 'longer … than many marriages' (36 years), the judge affirmed that in 'those circumstances [the deceased] had a substantial obligation and responsibility towards [the claimant]'.[42] Such an approach once more seems to reflect the attitudes revealed by the research conducted by Humphrey *et al.* (2010, Figs 4.1 and 5.2) which showed that there is strong public support for cohabitants being included in the intestacy rules, but also that support for the partner is a) not as strong as for a spouse; and b) stronger the longer the couple have lived together.

The cases have again primarily pitted the applicant against the children of the deceased by a former relationship. As with an application by a spouse or civil partner, the court must also have regard, under section 3(2A) to the age of the applicant, the length of the period of cohabitation, and the contribution made by

[41] *Iqbal v Ahmed* [2011] EWCA Civ 900, [2012] 1 FLR 31 at [10].
[42] [2008] EWHC 31 (Ch) at [39]. See also *Cattle v Evans* [2011] EWHC 945 (Ch), [2011] 2 FLR 843 (17 years, with 2 year interruption).

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the applicant to the welfare of the family or of the deceased, including any contribution made by looking after the home or caring for the family. But it is arguably harder to determine what 'reasonable provision' should be for a cohabitant than for either a spouse or a dependant, precisely because the relationship between the couple will have been 'marriage-like' and yet the statute constrains the court to considering what is reasonable as 'maintenance'.

How far, for example, should the court have regard to the lifestyle that the couple enjoyed together, as compared to what the surviving partner 'needs' for her future support? In *Negus v Bahouse,*[43] a wealthy businessman, who had been married twice before and had adult children, formed a relationship with a younger woman and invited her to move in with him. He had made his will, which did not include her, shortly before they began cohabiting, and did not change it during their eight years together. The applicant claimed they were engaged (which would not have altered her legal status regarding the estate but might have helped emphasise the quasi-marital nature of their relationship), but there was some dispute about this. Nonetheless, as the trial judge put it,

> The relationship … suited them both. He wanted a devoted female friend, companion and lover and got it. She wanted security and a roof over her head.[44]

The judge found that

> Her life had changed in eight years, no doubt allowing for the ups and doubts and vicissitudes of life, nevertheless, much for the better. It does seem to me that lifestyle or 'tone' … is at least to be taken into account.[45]

He concluded:

> In my judgment, having regard to her age, the length of time she was with Henry, the factual background that I have previously mentioned, the fact that he paid for everything and provided her with a home and to the promises she made to him about a roof over her head,[46] she is entitled at least to a reasonable degree of financial security and a degree of comfort for the rest of her life.[47]

She was awarded assets worth £500,000 out of an estate worth £2.2 million, already having assets worth around £370,000. Here, the bargain struck by the couple – 'security and a roof over her head' in exchange for being the deceased's 'companion' and her completion of her side of the bargain over a reasonably long period enabled the court to provide her with an award which would reflect her having 'earned' her share.

When reviewing the law, the Law Commission (2009, paras 4.130, 4.134) initially argued that taking account of lifestyle during the cohabitation is correct in that it recognises that a cohabiting relationship goes beyond one of mere dependency, includes mutual contributions and gives due regard to its duration, and they recommended that a cohabitant's claim should not be limited to maintenance but should instead be defined as 'such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive, whether or not that provision is required for the applicant's maintenance.' However, after consulting, they withdrew their recommendation (Law Commission 2011, paras 8.164-8.165). Pending implementation of the Law Commission's (or other) proposals for reform of the law governing property allocation when a cohabiting couple separate, there is no 'cross-check' akin to that of divorce which can be applied to determine how to calibrate a family provision award for a cohabitant. They did, however, suggest that, should financial remedies be introduced for cohabitants who separate, the

[43] *Negus v Bahouse* [2007] EWHC 2628 (Ch), [2008] 1 FCR 768.
[44] *Negus v Bahouse* [2007] EWHC 2628 (Ch), [2008] 1 FCR 768, at [28].
[45] *Negus v Bahouse* [2007] EWHC 2628 (Ch), [2008] 1 FCR 768, at [88].
[46] That is, that she would give up work and look after him and in return, he would give her a roof over her head.
[47] *Negus v Bahouse* [2007] EWHC 2628 (Ch), [2008] 1 FCR 768, at [87].

position regarding the maintenance standard should be reviewed. In the meantime, the nature of the relationship between the parties, the extent to which the claimant fulfilled her role as the partner of the deceased, and a comparison between her standard of living in the absence of an award, and what she would have enjoyed had the relationship continued, are factors to which the courts give weight. Once this is done, the relief of hardship, relative both to the prior lifestyle, and that of the competing beneficiaries, will determine the award made.[48]

4.3. Adult children of the deceased

The final category of claimants concerns Kerridge and Brierley's 'lame ducks'. These are adult children of the deceased who have either been excluded from the will, or whose claim on intestacy is superseded by that of a surviving spouse. At first sight, the recognition of the adult child's claim appears to mark a reversion to the traditional centrality of heirship in inheritance law. However, the concern here is not to ensure that wealth remains within the family (where the 'heir' is merely the next guardian of the patrimony) but rather to acknowledge the claim of the child, based on his or her individual needs, to be supported beyond the death of the deceased. Such 'children' challenge the usual assumption in English law that, once they reach adulthood, financial responsibility (as distinct from the tie of affection) towards one's children terminates. In a time when reaching autonomous adulthood appears to be a lengthening process, both from an economic and emotional perspective, and in an era when the centrality of the 'child' as the true focus of the family 'project' is increasingly felt (Beck and Beck-Gernsheim 1995, Ch 4) the extent to which law should recognize a legal 'obligation' as stretching into adulthood has assumed greater importance. But it raises a further dilemma for legal and social policy when put alongside the supposedly reciprocal yet clearly only moral obligation (in England and Wales anyway)[49] of caring for one's parents in their old age in a context of shrinking pensions, increased longevity and the inadequacy of state or commercial provision of adult care.

Espinosa v Bourke[50] illustrates the dilemma very clearly. The appellant had been married five times and had numerous partners and she had no secure means of earning her living. She had a son, who moved to live with his grandparents after falling out with her. When the grandmother died, her father and son moved in with her, the father meeting all the household expenses and paying off her mortgage. He promised her that she would benefit from the estate which he had inherited from her mother when he died. However, the appellant spent most of the last year of the father's life in Spain where she married yet again, bringing her husband back to live with her in England. Her father relied on 'meals on wheels' and carers during much of that time and he changed his will leaving his entire estate (worth about £196,000) to her son, stating that the appellant 'has, during my lifetime, been adequately provided for and she has also shown, in my opinion, a degree of irresponsibility.'[51] The trial judge regarded her as having shown minimal commitment to the father and dismissed her claim that reasonable provision had not been made for her.

There has been confusion in the case-law concerning whether, for an adult child who is capable of earning his or her own living, some sort of 'moral obligation' must be owed by the deceased to the child, or some other special circumstances must exist, to justify making (further) provision for him or her from the estate. Indeed, section 3(1) of the Act requires the court to take into account 'any obligations and responsibilities which the deceased had towards' the applicant, and 'any other

[48] See for example, *Baker v Baker and Another* [2008] EWHC 937 (Ch), [2008] 3 FCR 547.
[49] Compare other jurisdictions such as Singapore (Maintenance of Parents Act 1995); Canada (eg Ontario Family Law Act 1990 s 32); Italy (Civil Code art 315).
[50] [1999] 1 FLR 747, CA.
[51] [1999] 1 FLR 747, CA at p 749E.The text provides another example of the expression of the testator's feelings; see Hacker (2010).

matter, including the conduct of the applicant or any other person, which … the court may consider relevant.' These provisions certainly leave scope for the court to consider both the way in which the deceased acted towards the claimant, and how the claimant behaved towards the deceased. The cases have now made clear that it is not a *pre-requisite* for an adult claimant to establish that the deceased owed some kind of moral responsibility to him or her.[52] But, in fact, the Court found that the promise to make provision for the daughter in his will did impose an obligation on the deceased against which the claimant's behaviour towards him should be weighed. Taking these and the claimant's very difficult financial circumstances into account, coupled with the fact that the grandson would be adequately provided for, it concluded that reasonable provision had not been made for her and she was awarded £60,000 (nearly one-third of the estate).

The case illustrates the difficulty of weighing familial obligations, derived not from law but from the way the parties chose to live their lives and relate to each other, but it also illustrates how central such family 'practices' are to understanding how the court reaches its conclusion on the claim. If one might feel that the daughter was 'lucky' in this case, the opposite conclusion might be drawn from *Garland v Morris.*[53] Here, the claimant was the younger of two daughters. Their mother left the father; the claimant remained living with him but they had a very poor relationship and eventually she moved out to live with a friend's family. Her mother later committed suicide. The mother left her estate, worth £33,000, to the claimant, who used it to buy a house to live in, but she subsequently became dependent on social security benefits. The father disapproved of her lifestyle as an unmarried mother, and the claimant had no contact with him beyond occasional letters and cards for the last 15 years of his life. When the father died, he left his whole estate (of some £284,000) to his elder daughter. Despite the very difficult financial circumstances in which the claimant was living and the disparity between her and her sister's financial circumstances, the judge rejected her claim, finding that the claimant 'could not be bothered' to try to meet up with the father (and he did not appear to wish to meet up with her either).[54] Here, the poor relationship between the two (and the fact that the claimant had benefited from her mother's will) was held to justify her exclusion from being provided for from the father's estate. Once again, it was the nature and quality of the relationship between the deceased and the claimant that determined whether such exclusion was 'reasonable'.[55]

In these cases, the claimant was in competition with other close family members for a share in the estate – her own son in the former, and her sister in the latter. In *Ilott v Mitson,*[56] the daughter was in competition with a number of animal charities for an estate worth around £486,000.[57] She had become estranged from her mother when she married, against her mother's wishes, at the age of 17 and attempts at reconciliation thereafter had failed. The daughter was in modest circumstances; she had not worked since the birth of her first child, her husband worked irregularly, and they now had five children and lived in rented accommodation and relied on welfare benefits. In a striking illustration of how the formation of intimate relationships is now viewed, the first instance judge rejected the argument by the charities that the daughter could not complain about lack of

[52] *Re Hancock (Deceased)* 1998] 2 FLR 346, CA; *Re Pearce (Deceased)* [1998] 2 FLR 705, CA and cases discussed below.
[53] [2007] EWHC 2 (Ch), [2007] 2 FLR 528.
[54] [2007] EWHC 2 (Ch), [2007] 2 FLR 528 At [15], [56].
[55] See, to similar effect, Leslie (1996, pp. 255-258).By contrast, in relation to intestacy provision – admittedly a different situation from that in this case - social attitudinal research (Humphrey *et al.* 2010, p. 53) found a strong preference for treating children equally, even where siblings might have different levels of need or different degrees of closeness with the deceased parent.
[56] [2011] EWCA Civ 346, [2012] 2 FLR 170.
[57] In an interesting aside, Wall P (at [1]) notes that there was no evidence to suggest the mother had any particular interest in, or love of, animals or birds!

financial provision 'if she decides against her mother's will, to throw in her lot with a man rather than remain with her mother'. Rather, in his opinion (with which the Court of Appeal agreed), '[a] daughter is entitled (indeed would be expected) to make a life with a partner of her choice and have a family of her own. She would reasonably hope that a parent would accept such a choice, and not blame her for it.'[58]

The essence of the case was the 'value judgment' which the court had to exercise in determining whether making *no* provision for her estranged daughter was 'reasonable provision' in the circumstances. It should be stressed that the test is not whether the decision itself was 'reasonable' – the focus is on the outcome for the claimant, not the behaviour of the deceased. But as we have seen, the only way the judge can reach a conclusion on this is to consider that behaviour, alongside the conduct of the claimant, and the other factors listed in the statute.

5. Conclusion

The Inheritance Act represents a significant inroad into the principle of testamentary freedom in English law, and it is therefore perhaps not surprising that both Parliament and the courts have attempted to keep its scope within bounds that focus on family-like relationships and on the relative financial hardship faced by the claimant. The eligibility rules use a combination of traditional family structure – spouse or partner and offspring of the deceased – and family practice – reflected in factual dependency upon the deceased – to mark out who may seek to obtain provision from a person's estate. Once a claim is eligible to be heard, it then falls to the applicant to justify the claim based on whether 'reasonable provision' has been made for them. This judgment is a 'value judgment', say the courts, and one which is difficult to set aside on appeal. The result is that in reaching the threshold value judgment, the judge is thrown back on 'common sense', and his or her own understandings of appropriate family behaviour and norms. This explains why there has to be a detailed factual exploration of the relationship between the deceased and the claimant rather than a simple comparison of the claimant's living standard with that of the deceased and other beneficiaries. It is how the parties behaved towards each other which will determine whether reasonable provision has been made. This demonstrates that, as suggested above, while the legislation might appear to demand evidence of an asymmetric relationship in which the claimant was dependent upon the deceased, the court, echoing Finch's findings (1989) regarding the recognition of family obligations, looks for a mutual and reciprocal relationship between them if the claim is to succeed.

In cases concerning spouses or cohabiting partners, the behaviour the court is looking for must be 'spousal' (or quasi-spousal) in nature. Has the widow/er shown that the relationship was a proper marriage, did he or she care for the deceased, did he or she take on a quasi-parental role to the deceased's other children, and so on? How long did the marriage or cohabitation last, such that the claimant can be shown to have 'earned' an entitlement? And the lifestyle enjoyed by the couple when the deceased was alive will be used as a benchmark in assessing what provision should be made now, even where the claim is limited to 'maintenance' and even though the purpose of the jurisdiction is relief from hardship. For hardship, just as is the case when assessing 'needs' in a divorce, is a relative concept dependent upon the particular facts of the case and the size of the estate.

Where adult children are the applicants, some sense of filial responsibility appears to be expected. A child who ignores her parent or (like the god-daughter in *Baynes v Hedger*) makes excessive demands on the deceased's wealth, has not behaved

[58] Quoted by Wall P in *Ilott v Mitson* [2011] EWCA Civ 346, [2012] 2 FLR 170 at [55]. The case was remitted to a different judge to determine quantum and the claimant was ultimately awarded £50,000: *Ilott v Mitson* [2014] EWHC 542 (Fam) which may be seen as striking a balance between the principle of testamentary freedom and the relief of hardship.

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appropriately and may find herself excluded. Indeed, the insistence of the courts that there is no requirement to show that the *deceased* owed a particular moral obligation to the *claimant* becomes turned round to an effective requirement on the part of the claimant to show that he or she fulfilled the obligation of a child to show concern for a parent during his or her lifetime. These judgments are not easily predictable however and sometimes appear rather a lottery. As we saw, while in *Garland v Morris* the daughter's estrangement from her father was regarded by the court as a failing on her part which helped justify her exclusion from his will, in *Ilott v Mitson* the daughter's marrying against her mother's wishes was excused and indeed, the mother was criticized for having spurned efforts at reconciliation. One explanation suggested (Cownie and Bradney 2003) for such differing outcomes is that judges from two different jurisdictions – Family and Chancery – may hear the claim and that while judges of the Family Division focus on the details of the relationship between claimant and deceased, Chancery judges spend little time in pondering these, being more concerned to analyze the legal provisions. The cases discussed in this paper were decided mainly at appellate level, by a mix of judges with both Family and other judicial experience so it is difficult to say whether their judicial 'culture' and mind-set might have influenced their approach. Indeed, all seem to have scrutinized the factual circumstances in great depth, including in *Garland v Morris* – even though that case was in fact decided by a Chancery judge. It might well be that judges with different legal backgrounds assess factual circumstances differently, but one would need a much larger sample to reach such a conclusion, and that is not the claim being made here.

English law, especially family law, is often criticized for its reliance on unstructured discretion. The insistence in the family provision jurisprudence that the court is engaged in a 'value judgment' is open to even greater challenge. As Black LJ noted in *Ilott v Mitson,*

> A dispassionate study of each of the matters set out in s 3(1) will not provide the answer to the question whether the will makes reasonable financial provision for the applicant, no matter how thorough and careful it is. …. So between the dispassionate study and the answer to the first question lies the value judgment to which the authorities have referred. It seems to me that the jurisprudence reveals a struggle to articulate, for the benefit of the parties in the particular case and of practitioners, how that value judgment has been, or should be, made on a given set of facts. Inevitably, this has led to statements that this or that matter is not enough to found a claim and this or that matter is required.[59]

This paper has argued that the only way one can 'articulate' how that judgment is made, is by understanding that what the judges are doing is using their own experience of family practices and norms to assess the family tie between deceased and applicant, taking due account of how that family itself 'operated' and what norms it shared. In so doing, the law can be used dynamically to determine which kinds of relationship, and what qualities of emotional or supportive bonds, should be recognized as giving rise to a 'sense of obligation', as Janet Finch would put it, to provide some financial provision for the applicant.

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[59] *Ilott v Mitson* [2011] EWCA Civ 346, [2012] 2 FLR 172 at [88].

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