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Will-Substitutes and the Claims of Family Members and Carers

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I. Introduction

'Who owns the tin opener?' is not a question which arises in healthy relationships. 'Who is in charge of the TV remote?' on the other hand is a perfectly proper matter for contention! For most couples and families the precise ownership of property is not a question to which they tend to give much attention, save in certain interactions with third parties, such as taking out a bank loan, or where there is a family business. Generally family members give no thought to the ownership of the tin opener because it simply does not matter. Family members will not seek to claim property rights as against each other in relation to their property, at least while the relationship is intact.

This means that the normal rules governing property tend not to work well in families. We cannot expect couples to set out precisely what their interests are during their relationship because it is not a question to which they give much thought. If they were asked about ownership they would probably reply they did not know and do not care who owned what. We cannot, therefore, expect them to spend effort, time or money on clarifying their legal position. It is precisely for that reason that some countries have a particular set of laws determining family ownership (eg, community of property regimes).

This ambiguity over the property ownership of couples in intimate relationships matters little generally because the issue of ownership *inter se* is only likely to be a major issue when the relationship comes to an end. Then in jurisdictions which do not have some kind of community of property regime, legal mechanisms are in place to allocate the appropriate ownership of property. In England the courts can make financial orders on divorce under the Matrimonial Causes Act 1973 (MCA) or following death under the Inheritance (Provision for Family and Dependants) Act 1975 (I(PFD) Act). Thereby the court can ensure that there is a degree of fairness and clarity in the allocation of the couple's property interests when it matters.

That is all well and good, save three points. First, these remedies may only be available in cases where couples have formalised their relationship through marriage. In England, for example, there are no orders redistributing the ownership of property available to unmarried cohabitants who separate.[1] There is much to discuss on that question, but it is not the primary issue for this chapter. The second question we can also put to one side is that ownership of family property may be important for third parties, such as creditors and those dealing with family businesses. The availability of the orders at the end of relationships does not deal with those cases. The third issue, and the one most relevant for this book, is that the party who owns the property might dispose of their property before the courts' jurisdiction applies. For example, a testator may seek to dispose of assets before death or divorce in order to avoid the court redistributing their property. The focus of this chapter is with such cases and specifically with those who by means of will-substitutes prevent the law allocating property following death between those in intimate relationships.

To address this issue we need to explore the policy issues concerning distribution of property on death carefully. We need to understand the strength of the arguments in favour of the court making orders that redistribute property following death, in order to assess whether there is anything particularly wrong with the use of will-substitutes designed to avoid the operation of that jurisdiction. The argument over the legitimacy of the courts' jurisdiction is typically presented as a clash between those who promote the freedom of the testator and those who promote the claims of family members. At a basic level, if you believe that the primary policy on disposition of property on death should be respect for the testator's wishes, then will-substitutes are of little concern to you. However, if you attach weight to the interests of family members and believe the court should protect them, then you will be much more concerned by will-substitutes, if they are used to defeat their claims.

This chapter will seek to unpack the claims that are made and the significance of these for debates over will-substitutes. It will be argued that the strongest cases for departing from testamentary disposition fall into three categories. The first is where it can be assumed the will no longer represents the deceased's wishes. The second is where there is a quasi-proprietary claim by a family member. The third is where the claimant has provided unpaid care for the deceased at a time of need. These will be explored in this chapter. It will be argued that will-substitutes should be set aside if necessary to protect the interests of claimants who fall within the last two of these three categories.

While the chapter will focus on the theoretical issues raised, it will use the approach taken by English law as an example of how these points will play out. This is helpful because as we shall see, the English legislation provides a broad

[1] J Herring, *Family Law*, 6th edn (Harlow, Pearson, 2015) chs 6 and 7.

discretion for the courts to interfere with the allocation of property through a will, without a clear ranking of the claims of the different parties. The judicial interpretation of the statute can be used to provide insight into the theoretical debates. We will start, therefore, with a brief overview of the Act.

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

Under English law the starting point is that a testator is free to dispose of their property as they wish. The I(PFD) Act enables relatives or dependants who believe that they have not been left an adequate sum in the deceased's will or by virtue of the rules of intestacy, to apply to court for an order they be paid money from the estate. The applicant bears the burden of proving to the court the merits of their claim. Generally the courts are reluctant to interfere with the allocation of property in a will, without a strong case.

It is remarkably difficult to find statistics on the extent to which the I(PFD) Act is used. Even the Law Commission with all the resources at its disposal was only able to find figures for the number of applications issued at the Chancery Division. It found in 2007 there were 43 applications under the legislation.[2] It is hard to believe that this is the complete picture. Notably, the statistics do not cover applications in the Family Division or County Courts. Of course, there are no figures on the number of cases which were settled or dealt with informally.

A. Who can Claim Under the Act?

The following groups of people can apply:

1. The spouse or civil partner of the deceased.[3]
2. The former spouse or civil partner of the deceased, provided the applicant has not remarried or entered another civil partnership.[4]
3. A person who

> during the whole of the period of two years ending immediately before the date when the deceased died … was living (a) in the same household as the deceased, and (b) as the husband or wife [or civil partner] of the deceased.[5]

[2] Law Commission, *Intestacy and Family Provision Claims on Death* (Law Com CP No 191, 2013) para 1.9.

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

[4] ibid, s 1(1)(b).

[5] ibid, s 1A.

The court would consider whether a reasonable person with normal powers of perception would say the couple was living together as husband and wife.[6] In using this test the reasonable person should be aware of the multifarious nature of marriages.[7] In *Churchill v Roach*[8] Judge Norris said that to live in the same household it was necessary to have

> elements of permanence, to involve a consideration of the frequency and intimacy of contact, to contain an element of mutual support, to require some consideration of the degree of voluntary restraint upon personal freedom which each party undertakes, and to involve an element of community of resources.

4. Any child of the deceased, including posthumous, adopted and grown-up children.[9] An adopted child cannot claim under this ground against their biological parents, but can claim against their adopted parents.[10]
5. Any person 'treated by the deceased as a child of the family in relation to' a marriage or civil partnership.[11] It most commonly applies in relation to stepchildren.[12]
6. Any other person 'who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased'.[13] The phrase 'maintained' in this definition is clarified in section 1(3):

> a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person.

There is much more that could be said about the list, but for now it is worth highlighting that it acknowledges the potential claims of those with a close personal relationship to the deceased, even if there is no blood tie. Indeed, it is notable that parents and siblings are not included as claimants in their own right. They can only claim if they are dependent on the deceased. This suggests it is the notion of financial dependence that is more important than a close blood tie.

B. The Meaning of the Reasonable Financial Provision

In determining what award is appropriate under the legislation, a somewhat subtle distinction is drawn between claims by spouses and others. If the claimant is the

[6] *Re Watson* [1999] 1 FLR 878.
[7] Although in *Baynes v Hedger* [2008] 3 FCR 151 a clandestine same-sex relationship did not fall within this category because it was not a publically acknowledged relationship.
[8] *Churchill v Roach* [2004] 3 FCR 744, 761.
[9] I(PFD)Act 1975, s 1(1)(c).
[10] *Re Collins* [1990] Fam 56.
[11] I(PFD)Act 1975, s 1(1)(d).
[12] *Re Leach* [1986] Ch 226.
[13] I(PFD)Act 1975, s 1(1)(e).

spouse, the question is simply whether the *provision* is 'reasonable'. For other cases, the question is whether the *maintenance* is reasonable. The emphasis on maintenance is important. A non-spouse applicant who is 'comfortably off' may have difficulty in persuading the court that they need to be maintained at a higher level than their current lifestyle.[14] The concept of maintenance will certainly not stretch to include luxuries.[15] A spouse may be well off, but still be able to claim the provision for them is unreasonable. Reasonable provision is not necessarily restricted to the minimum necessary to survive.[16] When considering the appropriate level for a spouse, the court will have regard to the age of the applicant, the duration of the marriage, the applicant's contribution to the welfare of the family of the deceased and the provision the applicant may reasonably have expected to receive if the marriage had been terminated by divorce rather than by death.[17] These factors may well lead the court to award spouses a larger sum than necessary simply to maintain them.

Under section 3, in considering a claim, the court should consider:

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 for an order … or any beneficiary of the estate of the deceased.
g. Any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

These factors are largely self-explanatory. It should be noted that factors (b), (c), (d), (f) and (g) require the court to consider the position of all those who may be seeking money from the estate.[18] So, although a claimant may show a close relationship to the deceased and be in great need, their claim may fail if there are others interested in the estate who are of greater need.

[14] *Re Jennings (Deceased)* [1994] Ch 256.
[15] *Re Dennis* [1981] 2 All ER 140.
[16] *Re Coventry* [1990] Fam 561.
[17] I(PFD)Act 1975, s 3(2).
[18] *Cattle v Evans* [2011] EWHC 945 (Ch).

III. Theory: Freedom of Testamentary Disposition

Most legal systems give at least some respect to the theory of freedom of testamentary disposition, although the weight it is given varies across jurisdictions. The principle claims that a person should be entitled to decide who will receive their property on their death. Just as a person when alive can give their assets to whomsoever they choose, so they should be able to on death. Others may believe it foolish or even immoral that I spend so much money on purchasing erudite law books, but still I am entitled to do that if I so wish, or at least as long as I retain mental capacity. In a similar manner, on my death I should be able to dispose of my property to promote the publication of yet more erudite law books, if I so choose. So understood, the principle of testamentary freedom is no more than a continuation of the rights the deceased had when alive.

However, few jurisdictions give complete protection to testamentary disposition. France and Germany, for instance, rely on 'forced heirship' or 'compulsory shares' provisions to protect the claims of the deceased's spouse or children.[19] England's I(PFD) Act allows the court to make orders altering the disposition of property in a will, as we have seen. But none of these jurisdictions ignore freedom of testamentary disposition altogether. They are presented as restrictions on that freedom, rather than removal of it. They all allow testamentary freedom once the testator's obligations have been met.

The principle of freedom of testamentary disposition seems to carry much less weight in cases of intestacy. Where no effective will is left (or a will deals with only a portion of the deceased's estate) then most legal systems have provisions which determine how the estate should be divided. Typically this will require the estate to be distributed to the testator's spouse or close relatives. A lively debate arises over the extent to which the intestacy rules should seek to ascertain the wishes of the deceased, or should determine what objectively would be a fair and appropriate division of assets.[20] These are not as distinguishable as might at first appear. Surely it is not unreasonable to presume that a deceased would want a fair and just settlement. Whichever approach is taken, and we need not enter that dispute, it is a less ferocious debate than that over interferences in testamentary disposition. That is because as long as a reasonable approach is taken, there is always the argument that if the deceased objected to the legislated automatic division it was open to them to make a will. Further, at least under English law, the existence of claims under the I(PFD) Act means that any manifest injustice caused by the automatic intestate division can be remedied by a court order.

It is appropriate now to turn to the theoretical debate. Why should particular weight be attached to the principle of testamentary freedom? Here are some of the arguments used.

[19] See chs 7 and 8 above, p 173 and p 188 and ch 15 below p 304 f.
[20] See Herring, *Family Law*, above n 1, ch 13 for a summary.

A. An Aspect of Ownership

John Locke is sometimes identified as the philosophical grandfather of freedom of testamentary disposition.[21] He regarded testamentary disposition as a crucial aspect of protecting the individual and their rights over property. The alternative was that property on death fell under the control of the king and feudal property structures. John Stuart Mill went so far as to see a right of testamentary power as 'one of the attributes of property'.[22] Supporters of testamentary freedom will acknowledge that the freedom could be used in what many would regard as a capricious way. But that, they would say, is typical of many legal freedoms. Cockburn CJ in *Banks v Goodfellow* stated:

> Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given … The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of the general law.[23]

What is important to note about this quote is that if a parent were, say, to deprive their children an inheritance through a will, this would be seen as a breach of moral duty by the testator, rather than any kind of interference with the legal interests of the claimant. The legal obligation and any moral obligation are kept quite distinct. Although a testator may have a legal obligation to provide for a child during childhood, once childhood comes to an end they have met their legal obligations, unless, at least in English law, there are special circumstances (eg, the adult child is living apart from a parent and has a disability or is receiving full-time education).[24] As it is during life, so too it should be on death.

B. Protecting the Interests of Elderly People

Testamentary freedom can be seen providing older people with a way of exercising power over their relatives. Even John Locke made reference to the fact that through 'hopes of an Estate the father secured their obedience to his will'.[25] While this may

[21] R Croucher, 'How Free is Free? Testamentary Freedom and the Battle between "Family" and "Property"' (2012) 37 *Australian Journal of Legal Philosophy* 9.
[22] JS Mill, *Principles of Political Economy* (1848) Bk II, ch 2 [4].
[23] *Banks v Goodfellow* (1870) 5 LR QB 549, 563–65.
[24] Children Act 1989, sch 1, para 2.
[25] J Locke, *Second Treatise of Civil Government*, ch VI, 'Of Paternal Power' (1690) para 72.

be seen as unpleasant, it should be remembered that old age can be a time of weakness and vulnerability. An older person may be particularly in need of support and care from relatives. They are in many ways powerless and dependent on others.[26] The ability to leave a gift in their will to a family member or to others who provide them with care may be one of the few tools of power they have left.

C. Showing Love

John Stuart Mill saw the ability of a parent to give a gift to a family member as a powerful way for parents to show their love and affection for them.[27] Making gifts to family members compulsory would deprive the testator of this ability.[28] Michael Sandel and other sociologists warned of the danger of making altruistic behaviour compulsory.[29] Doing so denies people the chance of being virtuous and can rob an act of its symbolic meaning. A gift under a will may be more significant than its financial value in so far as it symbolises a relationship of love or is a formal acknowledgement of the relationship. Especially given the emotional trauma that can follow a death, we should be slow to inhibit the emotional comfort that a gift can provide.

There is a broader point here and that is that if a testator does not have testamentary freedom then there is a fear that they will be less happy during their life. They will be concerned at the inability to express their love or ensure the future wellbeing of someone close to them.[30] This may cause worry. It may cause them to make inappropriate gifts during their lifetime. These points show the error in claiming that as the deceased is dead their views and interests can be ignored. For example, it has been asked: 'What sense does it make for society to allow the wishes of the deceased to trump the happiness of the living?'[31] But, that overlooks the impact of the testamentary disposition rules on those living, but contemplating the wellbeing of their loved ones after their death.

D. Discriminatory Provision

Systems of forced heirship, or those which seek to identify the moral obligations that a deceased owes, are in danger of imposing on a testator the norms and values

[26] J Herring, *Older People in Law and Society* (Oxford, OUP, 2009).
[27] Mill, above n 22, Bk II, ch 2 [3].
[28] ibid.
[29] M Sandel, *What Money Can't Buy* (London, Allen Lane, 2012).
[30] D Kelly, 'Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications' (2013) *Fordham Law Review* 1125.
[31] L Tritt, 'Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code' (2010) 61 *Alabama Law Review* 273, 288.

of the dominant culture. Daniel Monk has pointed out the benefit for lesbian and gay testators of testamentary freedom enabling them to provide for lovers, free from heterosexist assumptions about the nature of their relationships or obligations to family members.[32] Allowing the testator to balance the competing claims of those close to them may seem preferable to the state imposing the dominant culture's understandings of those obligations.[33] A good example of the dangers is a fascinating study by Malcolm Voyce of the response of the Australian courts to claims surrounding family farms, who found that the courts protected the interests of sons at the expense of widows and daughters.[34]

E. Incentives

Many writers on the nature of property have emphasised that property rules encourage people to work, save and invest, by enabling them to reap the rewards of labour.[35] This is also seen as a particularly important reason for allowing freedom of testamentary disposition. If we were to restrict what people could do with their property on death then it would mean that people would have less incentive to work or save.[36] Although, to be fair, we may need to balance the incentive against the fears that hope of an inheritance decreases the incentive on the donee to work or save. Andrew Carnegie famously suggested that 'the parent who leaves his son enormous wealth generally deadens the talents and energies of the son, and tempts him to lead a less useful and less worthy life than he otherwise would'.[37]

F. Conclusion on Testamentary Freedom

These arguments in favour of testamentary disposition appear to create at least a prima facie case for respecting testamentary disposition. In other words, that unless a claim can be made on behalf of the state the testator should be able to use wills to dispose of property. Without wills or will-substitutes a person facing death may have to spend their last few days organising their financial affairs through gifts. That is hard to justify as an appropriate policy. Allowing the use of wills and substitutes seems a far more preferable approach.

[32] D Monk, 'Sexuality and Succession Law: Beyond Formal Equality' (2011) 19 *Feminist Legal Studies* 231.
[33] JC Tate, 'Caregiving and the Case for Testamentary Freedom' (2008) 42 *University of California Davis Law Review* 129.
[34] M Voyce, 'Family Provision, the Family Farm and Rural Patriarchy: Three Actors in Search of a Play?' (2014) 19 *Deakin Law Review* 349.
[35] Kelly, above n 30.
[36] ibid.
[37] A Carnegie, *The Gospel of Wealth and Other Essays* (London, Penguin, 2012) 34.

IV. Theory: Claims of Relatives and Carers

Here I will explore five arguments that relatives or carers might rely on to make a claim against the estate. I will suggest that the first two (based on a moral claim and on need) are not strong enough to justify a departure from testamentary freedom, but the final three (based on claims the testator made a mistake, legal obligations and care) are.

A. Moral Claim

The claim that adult children or other family members have a moral claim against their parents seems increasingly outdated. John Stuart Mill claimed that children could be entitled to maintenance and education, and that leaving them with the abilities to be independent would be sufficient to meet parental obligations.[38] Adult children would have no further claim against their parents. His argument must be viewed in current economic conditions. John Langbein has spoken of the fact that children now 'get their inheritance early'—largely through an investment by parents in their education, especially given university costs.[39] Although, for middle-class parents, nowadays a degree of help in housing costs may be common too, at least early in their child's career. We might agree that the extent of financial support given or received by adult children from their parents varies hugely from case to case and we cannot assume, given the very significant financial contributions received by some children from their parents during their lifetime, that automatically all children should receive an inheritance.[40]

It certainly seems that, as far as England is concerned, moral attitudes towards family inheritances are changing. Increasingly sociologists recognise that family is constituted by 'doing rather than being'.[41] It is feelings of obligations and commitment which are shaped in part by social expectations and cultural values, and also by the particular qualities of the relationship between the individuals. For David Morgan a 'focus on doing, on activities, moves us away from ideas of the family as relatively static structures or sets of positions or statuses'.[42] A leading study in England is that of Janet Finch and Judith Mason who found support for a relational social existence.[43] They emphasised, however, that the notion of family was

[38] Mill, above n 22, Bk II, ch 2 [3].
[39] JH Langbein, 'The Twentieth-Century Revolution in Family Wealth Transmission' (1989) *University of Chicago Law Occasional Paper* no 25.
[40] D Reid, 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (2008) 12 *Edinburgh Law Review* 391.
[41] G Douglas, 'Family Provision and Family Practices' (2014) 4 *Oñati Socio-legal Series* 222.
[42] D Morgan, *Rethinking Family Practices* (Basingstoke, Palgrave, 2011) 5 f.
[43] J Finch and J Mason, *Passing On: Kingship and Inheritance in England* (London, Routledge, 2000).

seen as flexible and dependent not on particular blood relationships or formal ties, but rather by the quality of the actual relationship. So, for example, a person may feel a close link to a sister they see regularly, but a weaker link to another sister they see only occasionally. That is not to say the kin link was irrelevant, but rather that it was less significant than the reality of the social relationship.[44] The only relationship where that was less strong was the one of child and parent:

> The core thread of fixity is the continuing relationship between parents and children. This remains at the core even in complex families … [T]he parent–child relationship is both predictable and privileged, as is seen very clearly in relation to inheritance.[45]

It flowed from this that most people did want to be able to leave something for their children and indeed that was seen as part of being a good parent. However, this was not seen as essentially tied to the mere fact of the relationship and depended to some extent on the quality of the relationship. So, we may gradually be moving away from a consensus that a parent is morally obliged to leave an inheritance to a child simply by virtue of the biological relationship.

Even if you disagree, and believe that parents ought to favour their children in the will, it is hard to see why this is any more than a moral obligation. Typically the law does not give effect to a moral claim. Of course, we might presume a parent would want to meet their moral obligations and, if there was no evidence as to what the testator wished, to assume they wished to meet their moral obligation, but that is the 'mistake' argument below. There is a further difficulty here, too. You may believe that a parent has a moral obligation to provide for an adult child in their will, but why should you impose your views on a testator who does not agree with that?

B. Need

Might the fact of need be sufficient to raise a claim of a relative to support? This, it is suggested, must be doubted. One person's need does not per se justify a claim by the one in need. More is needed such as evidence that the claimant suffered a loss as a result of caring for the testator or had relied on a promise of the testator. Such claims will be discussed later.

A claim based on need alone is not given much weight under the I(PFD) Act. In addition to the general factors, the court will consider 'the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant, and … the length of time for which the deceased discharged that responsibility'.[46] The Court of Appeal, however, has suggested that it is willing

[44] Reid, above n 40.
[45] Finch and Mason, above n 43, 59.
[46] I(PFD)Act 1975, s 3(4).

to infer assumption of responsibility from maintenance.[47] However, the fact of previous maintenance is likely to exclude the most needy of claimants: those who have provided care for no payment. The courts are generally reluctant to allow adult children who have sufficient earning capacity to succeed in making a claim against their parents' estate.[48] The difficulty facing an employed adult child claimant is in showing that an award would be reasonable for his or her maintenance. Even in cases of need the courts have usually required that an adult child establish a 'moral obligation' or some other special circumstances if the claim is to succeed. In *Garland v Morris*[49] it was found to be reasonable for the deceased to make no provision given his daughter had not spoken to him for several years, despite her need. Examples of a moral obligation or special circumstances include a son who had worked on the family farm in the expectation that he would inherit it,[50] and an applicant whose father was left money by the applicant's mother on the understanding that he would leave the money in his will to the applicant but did not.[51] This seems the right approach; there are many people in need in the world and something more than that is required to justify an interference in testamentary freedom.

C. Correcting Mistakes

Now, I will start with the first of three arguments which I suggest do justify interference in testamentary freedom. One way of justifying some interference is that we need to correct mistakes in the will and ensure that the allocation of the estate meets the intent of the testator. So understood the claimant is arguing that the testator would never have made the will they made (or allowed the intestacy rules to operate) had they known of the circumstances at their death.[52] For example, a child in dire need claiming under the I(PFD) Act could argue the testator made their will with no provision for them on the assumption that they would be in a financially sound position. Had the testator known the truly awful financial position they were in they would have made a different will. In *Re Hancock (Deceased)*[53] an adult child succeeded in a claim when there was a dramatic increase in the value of the estate (from £100,000 to £650,000) from the time the will was made and death. The Court of Appeal accepted evidence that, had the deceased been aware that his estate would increase to this level, he would have provided for his adult child. Unforeseen events are, of course, the curse of the will maker. The jurisdiction is

47 *Jelley v Iliffe* [1981] Fam 128; *Bouette v Rose* [2000] 1 FCR 385.
48 *Ilott v Mitson* [2011] EWCA Civ 346; *Re Hancock (Deceased)* [1998] 2 FLR 346.
49 *Garland v Morris* [2007] EWHC 2 (Ch).
50 *Re Pearce (Deceased)* [1998] 2 FLR 705.
51 *Re Goodchild* [1996] 1 WLR 694.
52 According to I(PFD)A 1975, s 21, a statement of the deceased is admissible evidence.
53 *Re Hancock (Deceased)* [1998] 2 FLR 346.

an acknowledgement that wills are in their nature an advance prediction of what claims one may or may not face and thus are inherently prone to error.[54]

Of course, this justification will not apply to all interferences with testamentary freedom. The 'forced heirship' provisions apply even where it is absolutely clear a testator intended to disinherit their child. Similarly it is not necessarily fatal to an I(PFD) Act claim that the testator would have made the same will even if he had known the facts.

D. Legal Obligations

It is well established that before any gifts can be paid out of an estate the debts of the testator need to be paid first. The claim of any donee must be subservient to the claim of the debtor. It may be that some claims from family members and close members can fall into the category of a debt, or at least equivalent to a debt. It is uncontroversial and entirely compatible with the principle of testamentary disposition that the will only applies to the estate of the deceased that remains once debts and legal obligations are met.

This, however, creates a difficult position for spouses, especially in countries where there is no community of property regime. English law, for example, has no community of property law regime for married couples, yet on divorce there is at least a 'starting point' of an equal division of the assets.[55] This approach has been developed by the courts to acknowledge that in a marriage the parties have made an equal contribution, whether by family care or wealth creation. There should be no preference for the home maker over the money maker.[56] However, the claim of the family carer will only be recognised once the court makes a financial order on divorce. There is a sense, then, in which a spouse has an inchoate right floating above the matrimonial assets, which crystallises when the divorce order is made. This is not a formal ownership, as such, but is a recognised legal claim.

The way a spouse might put their claim is that it would be surprising if they were worse off because their marriage ended by death than if it ended by divorce. Indeed, this argument seems implicitly accepted by Parliament because under the I(PFD) Act section 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.

However, death and divorce are distinguishable. On divorce, the crucial question is how to divide up the property fairly between the two parties. On death, there is no division required except between the spouse and the other relatives or legatees.

54 Kelly, above n 30.
55 *White v White* [2001] 1 AC 596.
56 ibid.

It could be argued, therefore, that on death a spouse might expect a greater share than on divorce.[57] The I(PFD) Act recognises that reasonable provision for spouses may be in excess of what is necessary for their maintenance. For a surviving spouse reasonable financial provision means 'such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance'.[58] In *Fielden v Cunliffe*[59] the Court of Appeal suggested that the principle of equal sharing of family property promoting in *White v White*[60] could be used, with its yardstick of equality guideline, but only with caution.[61] 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.

The quasi-property claim based on a potential claim under the MCA can only be made by a spouse. However, increasingly in English law a successful claim to the family home may be made by a non-spousal family member, such as a cohabitant or carer. This might be done through the law on constructive trusts or proprietary estoppel.[62] Looking at the claim of proprietary estoppel, this has been understood as where a property owner has made an assurance or promise which has been relied upon by the claimant in circumstances in which it would be unconscionable for the owner to deny a claim. They can apply to promises by an owner that on death they will leave a property by a will. Increasingly the courts are being more flexible over the circumstances in which a claim can be made. In *Gillett v Holt*[63] where Walker LJ states: '[T]he fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round'.

Simon Gardner sees in such dicta a willingness in the courts to develop a more flexible claim for cohabitants based on the nature of their relationship.[64] He would seek to develop the law so that the remedies for property disputes for unmarried couples (based on a proprietary estoppel or constructive trust claim) would match those available for married couples under the MCA. We may be some way from that, but developments in the law are heading in that direction. In so far

[57] *P v G* [2006] Fam Law 179; *Iqbal v Ahmed* [2011] EWCA Civ 900.
[58] I(PFD)Act 1975, s 1(2)(a).
[59] *Fielden v Cunliffe* [2005] 3 FCR 593.
[60] *White v White*, above n 55.
[61] See also *Baker v Baker* [2008] EWHC 977 (Ch); *Lilleyman v Lilleyman* [2012] EWHC 821 (Ch).
[62] S Gardner, 'Material Relief Between Ex-cohabitants 2: Otherwise than Via Beneficial Entitlement' (2014) 78 *Conveyancer & Property Lawyer* 202.
[63] *Gillett v Holt* [2000] Ch 210.
[64] Gardner, above n 62.

as Gardner's assessment is correct, it provides a quasi-proprietary claim over the property which could justify the I(PFD) Act jurisdiction.

So we see in both the MCA and the use of proprietary estoppel and constructive trusts the law acknowledging that the care work within intimate relationships and the nature of a relational life generates a strong claim to family homes and other property. The I(PFD) Act can, therefore, be justified as an alternative way of acknowledging that a spouse or cohabitant could have made a claim under the MCA or for proprietary estoppel, and to give effect to that claim.

E. Care

I believe that the strongest claim comes from those who have provided care to the deceased, particularly care work which has gone unpaid. The carer of the deceased will have provided them with a clear benefit at a loss to the carer.[65] Where they are in need, as a result of that care, there seems a particularly strong basis for a claim against the estate.[66]

Let us imagine someone becomes frail and in need of care. A family member or friend starts to provide care and this gradually increases in burden and extent. The carer is suffering a significant loss in terms of money and cost. We might hope in such a case the value of the care will be recognised by the state and they will receive a degree of financial support. However, few countries provide adequate state support. In the absence of state support, the cost of the care lies where it falls. This is what currently happens and the economic and social costs of the care fall on carers, women in particular.[67] That is unacceptable and (in the absence of state support) we need to find a way of requiring the recipient of care to pay or compensate the carer.

One way of doing this would be to require the carer and the older person to enter a contract to set out their obligations and expectations. There may be some people for whom this is appropriate, but not many. In part this is because such a contract will be impossible to draft. Intimate life is messy and complex.[68] We cannot foresee now what care will be needed. Care, especially in later life, is not a matter of nine to five, with four weeks holiday. Its tasks are not easily defined. Caring is a matter of doing, and letting be. Of sitting still, being there. Of doing complex tasks, of holding close. It is not reducible to the black and white of print. It is unbounded, unpredictable.

There is another reason to avoid contracts. Sometimes the truth is hard to look at. Our society has so elevated independence that an acknowledgement of care can be

[65] J Herring, *Caring and the Law* (Oxford, Hart Publishing, 2013) ch 2 for a discussion of the losses caused by caring.
[66] B Sloan, *Informal Carers and Private Law* (Oxford, Hart Publishing, 2013).
[67] Herring, *Caring and the Law*, above n 65.
[68] J Herring, *Relational Autonomy and Family Law* (Amsterdam, Springer, 2014).

a sign of weakness. To our shame being a burden to others has become one of the great fears of old age. Putting this all down in writing: that one needs care, that the other will suffer loss, that something is owed is for many hard to face. Worse too is the contractarisation of care, and that care can lose its value. The care ceases to be marked by love, trust and mutuality. It becomes reduced to legal obligations and a reading of sub-clauses. Questions become asked that should not be: do they love me? Or are they doing this because they are contractually required so to do? Have I become an unconscionable bargain?

The resolving of payment for care ex post facto, post-death carries many benefits.[69] It means the parties need not try and set this out in advance. Only in retrospect can the costs be calculated and the value of care assessed. Then the compensation can be paid for the love shown, rather than the financial arrangements impacting the caring relationship itself. It ensures that widespread obligation of reciprocity is met, which as described by Janet Finch

> 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.[70]

The problem with the I(PFD) Act, as already mentioned is that only if a carer is being maintained by the deceased (or a spouse or cohabitant of the diseased) will they fall within a category of claimants.[71] Yet the unpaid carer may well not be maintained and so fall outside the protection of the legislation. This, it is suggested, is odd given that the carer has a far greater claim than other claimants.

While inheritance issues are commonly viewed as matters of fairness between the testator and the different family members, it is important to appreciate the state interests here. Looking at the position of those who lack resources to care for themselves, unless the state undertakes the care for all those who cannot provide for themselves, there needs to be a way of sharing that burden by imposing obligations on others. Typically this is achieved through the family and the sharing of financial costs of raising children between parents and the state. A range of arguments might be made for why it is not unreasonable to impose such obligations on parents. In many countries there is a debate over the extent to which care of older people is seen as a matter of family obligation and if it is, how that is to be given legal effect.

The possibility of them using legislation such as the I(PFD) Act to ensure that carers are adequately provided for from the estate of the deceased ensures that the economic costs of the carer do not fall on the state and that the care of older

[69] TP Gallanis and J Gittler, 'Family Caregiving and the Law of Succession: A Proposal' (2012) 45 *University of Michigan Journal of Law Reform* 761.
[70] J Finch, *Family Obligations and Social Change* (Bristol, Polity Press, 1989) 240.
[71] *McIntosh v McIntosh* [2013] WTLR 1565.

people can be undertaken by family members with a degree of reassurance that they will receive some form of compensation on death.

V. Will-Substitutes and Anti-Avoidance

So far this chapter has been looking at the arguments over interferences with testamentary disposition. It has been argued that there are good reasons for the law to interfere with testamentary dispositions on the basis that the will fails to meet the intentions of the testator or legally protected obligations, or to ensure compensation for care. The I(PFD) Act and similar legislation enables the courts to do this. However, a testator might try and avoid the operation of the legislation by using a will-substitute or otherwise disposing of property prior to death. In so far as that defeats the justifications for the Act, such avoidance must be countered.

An application under section 1 of the I(PFD) Act only deals with property passing under a will; a *donatio mortis causa*;[72] statutory nominations[73] and jointly owned property that passes automatically on death to the joint owner.[74] However, it does not apply to other will-substitutes. For example, death benefits of pension schemes and life insurance benefits[75] cannot be challenged under section 1. However, the Act does include some anti-avoidance provisions through section 10 and these could apply to some will-substitutes.

Under section 10, the court can order a person who has received property from the deceased to make a payment to, or transfer property to, the estate in the following circumstances (section 10(2)):

(a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition, and
(b) that full valuable consideration for that disposition was not given by the person to whom or for the benefit of whom the disposition was made (in this section referred to as 'the donee') or by any other person, and
(c) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act.

Unsurprisingly the donee cannot be required to pay more than the value[76] of what they received from the testator, but it need not be the full amount.

[72] I(PFD)Act 1975, s 8(2).
[73] ibid, s 8(1).
[74] ibid, s 9(4), applied in *Lim (An infant) v Walia* [2014] EWCA Civ 1076.
[75] ibid, s 10(7) allows premiums to be covered. See ch 3 above p 58 and p 68 f.
[76] The value is the value at the time of the death.

In deciding whether to make an order and what amount to require repayment the court will

> have regard to the circumstances in which any disposition was made and any valuable consideration which was given therefor, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.[77]

The provision covers any disposition 'payment of money (including the payment of a premium under a policy of assurance) and any conveyance, assurance, appointment or gift of property of any description, whether made by an instrument or otherwise'.[78] It was, therefore, applied without difficulty to a husband who shortly before his death transferred property to a child of a previous marriage by way of a gift, in order to limit the amount his wife would inherit.[79]

It is important to notice the limits of this provision. First, it must be shown that it was done with the intention of defeating a claim under the Act. That may prove hard to establish.[80] Second, it only covers dispositions for which there was not full valuable consideration. The payment out under a life insurance policy or pension scheme, for example, would probably not fall under that provision.

It is difficult to know how often these anti-avoidance measures are used or how the courts use their discretion. There is very little case law on them, which suggests they are rarely relied upon. They were referred to in *Dellal v Dellal*.[81] The testator, Jack Dellal, was an extremely wealthy man, who it was claimed had £445 million, although his estate on death was valued at £15.4 million. His wife claimed he had disposed of property to his children from previous relationships in order to defeat her application. The reported hearing was an application to strike out the claim, made on the basis that the wife's argument was speculative, as she had not identified precisely any dispositions. This failed on the basis that it had not been shown that the wife's claim was entirely a 'fishing expedition'. The most interesting comments are from Nicholas Mostyn, who contrasts the differences between section 10 of the I(PFD) Act and the similar provision under section 37 of the MCA designed to set aside transactions entered into in order to defeat financial claims on divorce. He notes:

> The effect of an order under section 37 is to annul or 'avoid' the transaction under attack. Moreover, the bad intention to defeat the principal ancillary relief claim is presumed for transactions done within the three year period before the avoidance claim. There is no time limit on attackable transactions. A transaction done 20 years earlier is, at any rate in theory, capable of being annulled. By contrast, a claim under section 10 of

[77] s 10(6).
[78] s 10(7), although donations *mortis causa* are excluded.
[79] *Dawkins v Judd* [1986] 2 FLR 360.
[80] It does not need to be shown to be the dominant motive behind the transaction: *Lazard Brothers and Co (Jersey) Ltd v Norah Holdings Ltd* [1988] 1 WLR 1307.
[81] *Dellal v Dellal* [2015] EWHC 907 (Fam).

> the 1975 Act does not affect the validity of the disposition under attack. If relief is granted then it takes the form of a money judgment against the disponee to pay a specified sum to the estate. There is no presumption as to the necessary bad intention and there is a six year time limit on attackable transactions.[82]

The fact that the time limit and the requirement of proof of 'bad intention' differ between the two pieces of legislation is hard to justify. Why should the claim of a spouse be weaker when the marriage has ended in death, rather than divorce? Indeed, as mentioned above, given there is only one spouse's needs to deal with on death, rather than the two on divorce, one might think her claim is all the stronger.

Do we need a more effective protection against the use of will-substitutes as an avoidance mechanism for legislation designed to protect the interests of carers and family members, such as the I(PFD) Act? I suggest it all depends on the strength of the reasons for the intervention in testamentary freedom. For those who support the priority of testamentary disposition over all other claims, will-substitutes appear to offer no concern. They are no more than another vehicle which a testator may use to ensure that their property reaches a desired beneficiary. Indeed, they may even be seen as a way of increasing that ability by providing an avenue less subject to public scrutiny. Similarly, if one believes the justification for using the I(PFD) Act is to ensure the will reflects the genuine intentions of the testator we can presume that the decision to use a will-substitute reflects the wishes of the testator.

However, it has been argued here that there are two cases where there is a legitimate restriction on testamentary freedom. The first is in so far as it protects quasi-proprietal claims, as it does in jurisdictions such as England where there is no community of property regime, and the expectation is that reallocation of property will take place at the end of a relationship to ensure a fair division. The second is where the claimant has undertaken unpaid care for the deceased. It has been argued that the provision of an award post death is the most appropriate way of dealing with that care, both as a matter of fairness between the parties and to peruse the state interests in ensuring care is provided for older people and that those who undertake that care, who are predominantly women, are not unduly disadvantaged in providing it. I would argue that these are important interests for which there is a strong interest in protecting. In these cases will-substitutes should not be permitted if they will impact on their award. If, as argued above, financial compensation for care is best provided after death, it is important there is a reasonably secure method for ensuring the provision cannot be bypassed by will-substitutes or other devices. There is, therefore, a strong case for extending the avoidance provisions under the I(PFD) Act.

[82] Ibid, [9].

VI. Conclusion

This chapter has explored cases where there is a claim by a family member or carer which is defeated or reduced as a result of a will-substitute. It has explored the case for testamentary freedom and accepted that it is a sound starting point, at least given the kind of property regimes most Western democracies use. The arguments used in favour of testamentary freedom would also support the use of will-substitutes. However, the chapter has explored the use of forced heirship law or legislation such as the English I(PFD) Act to amend the provision made by a will or the intestacy laws. It has been argued that the strongest justifications for such intervention in testamentary freedom occur where the claimant is arguing that they have a property claim or quasi-property claim over the estate or where they have provided unpaid (or underpaid) care for the deceased. These claims seem as effective against a will-substitute as they are against the will itself. Indeed it has been argued that the use of legislation such as the I(PFD) Act is an effective tool to encourage the care of older people and the best way of ensuring compensation for the costs of that care. It also pursues important state goods in ensuring that the care is provided and valued. In so far as will-substitutes defeat those goals they should be liable to be set aside in the same way wills can be.