*Classical Quarterly* 62.1 145–162 (2012) Printed in Great Britain
doi:10.1017/S0009838811000498


# *OIKOS*, FAMILY FEUDS AND FUNERALS: ARGUMENTATION AND EVIDENCE IN ATHENIAN INHERITANCE DISPUTES[1]

## INTRODUCTION

An Athenian mercenary soldier called Astyphilus died abroad, probably some time between 375 and 365 B.C. His bones were brought back to Athens for burial, and his estate was taken over by Cleon, a cousin on his father's side, who claimed that his young son had been adopted by Astyphilus as his heir, in a will left for safekeeping with Hierocles, a maternal uncle of Astyphilus. But Astyphilus had a half-brother, also a soldier, who was away on campaign at the time of the funeral. On his return to Athens he challenged the validity of the will, claiming the estate for himself as Astyphilus' next of kin.[2]

We know about this case because Astyphilus' half-brother had enough sense (and, presumably, enough money) to consult Isaeus, the logographer who specialized in inheritance law, and who wrote the speech now known as Isaeus 9 for him to deliver in court. In fact, eleven of Isaeus' twelve surviving speeches were written for litigants involved in inheritance claims, and all but one of these involve disputes about wills or adoptions. So Isaeus' work is our main source of information on this branch of Athenian law, with the addition of two speeches from the Demosthenic corpus ([Dem.] 43 and [Dem.] 44). The argumentation used in Isocrates 19, written for an inheritance case before a court in Aegina, also shares some common features with the Athenian speeches.

In the context of a wider scholarly debate on the nature of the judicial decision-making process in Classical Athens, much has been written about the means of persuasion used in Isaeus' speeches. In the present paper I want to re-examine two propositions put forward in the course of that debate which have now become widely accepted. The first is that the Athenian courts, when dealing with contested inheritance claims, showed a tendency to favour the deceased's next of kin over a son adopted by will. The second is that much of the evidence adduced by litigants

[1] This is a revised and expanded version of a paper given, under the title 'Continuity and conflict: the *oikos* in Athenian inheritance disputes', at the Fifth Arachne Conference, '*Oikos / familia*: the family in the ancient Greco-Roman world', University of Gothenburg, November 2009. I am indebted, as ever, to my former Ph.D. supervisor, Professor Chris Carey, for his help both in preparing the original conference paper and in adapting it for publication. I also thank *CQ*'s anonymous reader for suggesting some further improvements.

[2] Cleon, who was a *patrilineal* first cousin of Astyphilus, would have had a stronger claim to the estate, in the Athenian order of intestate succession, than the speaker, who was Astyphilus' *uterine* half-brother. The speaker's claim to be next of kin to Astyphilus rests on his assertion that Cleon and Astyphilus had lost their legal relationship because Cleon's father had been adopted into a different *oikos*. I have argued elsewhere that Isaeus' client was probably vulnerable on this point, and that the speech was designed to distract the audience's attention from the real issue; see B. Griffith-Williams, '"Those who know the facts": witnesses and their testimony in Isaios 9', *Acta Antiqua* 48 (2008), 253–61.

in these cases was irrelevant to the legal points at issue, and that cases were decided on the basis of 'extra-legal' evidence concerning such matters as the character of the rival claimants and relations within the family of the deceased. By applying a comparative methodology, I hope to shed new light on the nature and force of the arguments deployed by these litigants, and of the evidence they adduce.

## THE EMPTY *OIKOS*

Before we consider these issues more closely, it is important to remember that inheritance in Classical Athens was not solely to do with the transmission of property. Equally important, if not more so, was the continuation of a deceased citizen's *oikos* ('family' or 'line of descent') by a successor who would not only inherit the estate but also carry out the funeral and commemorative rites on behalf of the deceased.[3] Ideally, an Athenian's heir and successor would be his natural, legitimate son, who enjoyed a privileged position under the law and could not be disinherited. But so important was the continuity of the *oikos* that, under a law attributed to Solon, a man with no legitimate sons could create an artificial heir and successor by adopting anyone he chose.[4] The original intention and scope of Solon's law are unclear, but by the fourth century it was interpreted as permitting adoption either *inter vivos* or by a will to come into effect after the testator's death. If an Athenian died without leaving natural legitimate descendants *and* without having adopted, then (unless the family gave him a son by posthumous adoption)[5] his property went to his next of kin in the order prescribed by the law on intestate succession, and his *oikos* became 'empty', or 'desolate' (*erēmos*).

That the Athenian *polis*, as well as individual families, had an interest in succession is demonstrated by a law cited at [Dem.] 43.75, under which the archon had a duty to 'take care of' (*epimelesthai*) various consequences of a citizen's death: orphans, *epiklērōn* ('heiresses', i.e. women left without a father or brothers), *oikōn exerēmoumenōn* (literally 'houses that are becoming empty', but translated in the Loeb edition as 'families that are becoming extinct') and pregnant widows. The precise nature of the archon's duties under this law is unknown, and need not concern us here, but we do need to consider what exactly is meant by *oikōn exerēmoumenōn.*

[3] As well as the annual commemorative sacrifices and libations at the family tombs, which in principle continued throughout the lifetime of the heir, the 'customary rites' (*ta nomizomena*) for the dead included the laying out and burial of the body, a funeral feast, and 30 days of mourning with offerings at the grave on the third and ninth days. In the absence of lineal descendants, responsibility for the funeral would have fallen to the next of kin or any available friends of the deceased. It is possible, however, that only direct descendants (including adopted sons) were obliged to perform the commemorative rites in subsequent years. R. Parker, *Polytheism and Society at Athens* (Oxford, 2005), ch. 1, gives a full account of Athenian funeral practices, including a summary of the scholarly debate on responsibility for the commemorative rites.

[4] For the position when a daughter (*epiklēros*) became the only surviving representative of her father's *oikos*, see A.R.W. Harrison, *The Law of Athens* (Oxford, 1968), 1.132–8.

[5] The practice of posthumous adoption, when family members provided an heir for a deceased kinsman who had not adopted *inter vivos* or by will, seems to have been a matter of custom rather than law. For a discussion of the attested cases, see L. Rubinstein, *Adoption in IV. Century Athens* (Copenhagen, 1993), 25–8.

The three basic meanings of *oikos* are 'house' (i.e. a building, synonymous with *oikia*), 'property' (sometimes interchangeable with *klēros*, 'estate') and 'family' (sometimes in the sense of 'line of descent', as in 'the House of Atreus' or 'the House of Windsor').[6] Douglas MacDowell argues that the use of the word in the sense of 'family' was relatively late, probably not occurring before the fifth century, and that the words *oikōn exerēmoumenōn* in the law cited at [Dem.] 43.75 (which may date back to Solon) related to estates 'left with no man in control', or perhaps even to houses 'left with no male inhabitant'. When, on the other hand, the phrase *erēmos oikos* is used rhetorically in forensic oratory, it means 'that a family has no male member left alive'.[7] There is, in fact, a clear overlap between these two meanings, with the consequences of a male head of household's death as the common factor.

According to several forensic speakers, an empty *oikos* was a state of affairs that most Athenians would want to avoid. Sositheos, the speaker of [Dem.] 43, claims to have introduced his son by posthumous adoption into the phratry of his father-in-law Eubulides, so that the *oikos* of Hagnias would not become extinct (*ἵνα μὴ ἐξερημωθῇ ὁ οἶκος*, [Dem.] 43.11). Three of Isaeus' clients, each of whom is defending a testamentary or *inter vivos* adoption, express a similar view. The speaker of Isaeus 2, who claims to have been adopted *inter vivos* by Menecles, accuses his opponents of insulting Menecles now that he is dead and trying to 'leave his house without heirs' (*ἐξερημοῦν αὐτοῦ τὸν οἶκον*, Isae. 2.15; *τὸν οἶκον αὐτοῦ ἐξερημώσων*, 2.35)[8] In Isaeus 6, Philoctemon is said to have made a will adopting his nephew Chaerestratus 'so as not to leave his family without heirs' (*μὴ ἔρημον καταλίπῃ τὸν οἶκον*, Isae. 6.5) if he should be killed on military service.[9] Thrasyllus, the speaker of Isaeus 7, goes further, suggesting that *all men*, when approaching death, take precautions 'not to leave their families without heirs' (*ὅπως μὴ ἐξερημώσουσι τοὺς σφετέρους αὐτῶν οἴκους*), by adopting someone who will carry out the customary rituals (*πάντα τὰ νομιζόμενα*) on their behalf (Isae. 7.30). When Thrasyllus attacks his opponent and her sister for their behaviour after their brother's death, there is an explicit contrast between 'property' (*klēros*) and 'family' (*oikos*): 'Now it was quite clear to Apollodorus that if he left his estate (*τὸν κλῆρον*) in the control of these people, he would render his family extinct (*ἔρημον ποιήσει τὸν οἶκον*). For what did he see before him? That these sisters of Apollodorus [the second] inherited their brother's estate (*τοῦ ἀδελφοῦ κλῆρον ἐχούσας*) but did not give him a son for adoption, even though they had children, that their husbands sold the land he left and his possessions for five talents, and split the money; and that his house was thus left shamefully and disgracefully without heirs (*τὸν δὲ οἶκον αἰσχρῶς οὕτω καὶ δεινῶς ἐξηρημωμένον*, Isae. 7.31).

In a case that was not concerned with inheritance, the speaker of Lysias 7 complains of the consequences if he were to be condemned to exile for uprooting

[6] For a fuller discussion of the possible definitions of *oikos*, see D.M. MacDowell, 'The oikos in Athenian law', *CQ* 39 (1989), 10–21, at 10–11.

[7] MacDowell (n. 6), 19–20.

[8] The use of similar argumentation in Isocrates' *Aegineticus* suggests that concern about the continuity of the *oikos* was not confined to Athens: '… now too that [Thrasylochus] is dead, [my opponent] is trying to annul his will and to leave the home without heirs' (*καὶ τὸν οἶκον ἔρημον ποιῆσαι*, Isoc. 19.3, Loeb trans.).

[9] English translations of Isaeus are from M. Edwards, *Isaeus, Translated with an Introduction and Notes* (Austin, TX, 2007).

a sacred olive stump: 'I would be childless and on my own. My household would be made desolate (ἐρήμου δὲ τοῦ οἴκου γενομένου). My mother would be stripped of everything.'[10] In this context, perhaps, the *erēmos oikos* may convey more than one shade of meaning, including that of a house that is literally 'empty' in the sense that it has no male occupant.[11]

When the phrase *erēmos oikos* occurs in forensic oratory, it might be argued that the writer of the speech was simply making a rhetorical point, but the existence of the law cited at [Dem.] 43.75 shows that the continuity of the *oikos* was a matter of public as well as private concern in Athens, and one that the courts would have taken seriously. The 'empty house' is also a recurrent *motif* in Euripidean tragedy, as, for example, in the lament of Peleus, who is left in old age with no male heirs after the deaths of his son Achilles and grandson Neoptolemus: 'Oh, what misery! Such a terrible sight I see here, receiving it with these hands into my house (δώμασιν)! Ah, this pain I feel, it overcomes me! Good people of Thessaly, we are ruined, finished! My family exists no more, no children are left in my house (οἴκοις) … My beloved boy, you have left my house desolate (δόμον ἔλιπες ἔρημον), you have abandoned me to a childless old age' (Eur. *Andr.* 1173–6; 1204–6). Theseus laments the desolation of his *oikos* after the death of Phaedra: 'My house is bereft (ἔρημος οἶκος), my children are orphaned. Alas, alas, you have left them, dear woman' (Eur. *Hipp.* 847–50). And one of the children in *Supplices* complains that he will inherit the 'empty house' of the orphan: 'And I, bereft of my hapless father, a wretched orphan shall inherit a desolate house (ἔρημον οἶκον), torn from my father's arms' (Eur. *Supp.* 1132–5). So, from a variety of contexts and with various shades of meaning, the idea of the 'empty house' would have been familiar to Athenian dicasts[12] and, irrespective of its legal significance, it is likely to have made a strong emotional appeal to them.

## WILLS AND ADOPTION

Despite the freedom of choice permitted by Solon's law, the majority of attested Athenian adoptions involve an adopter and adoptee who were already related, either by blood or through marriage – an indication, presumably, that the average Athenian would not have wanted his property, and responsibility for his family cults, to pass outside his wider circle of kinsmen. One possibility, in fact, was to adopt his intestate heir – that is, the person who would have inherited his property in any event – in order to ensure the separate continuation of his own *oikos*. But when the adopted son was a more distant kinsman, or a complete outsider, the adoption was vulnerable to challenge by the adopter's next of kin.

[10] Lys. 7.41, tr. S.C. Todd, *A Commentary on Lysias, Speeches 1–11* (Oxford, 2007). Todd comments, ad loc.: 'For a household to become "desolate" (i.e. with no heir to carry on cult responsibilities) is a matter of concern particularly in inheritance speeches, where it is frequently put forward to justify adoption … For it to be presented as an argument against a conviction is to my knowledge without parallel.'

[11] Cf. MacDowell (n. 6), 10: 'Admittedly one sometimes finds an instance where it is not easy to decide which sense the word [*oikos*] has. Two of the senses, occasionally even all three, may overlap.'

[12] I use the term 'dicast', an anglicized form of the Greek *dikastēs* (pl. *dikastai*), in preference to either 'judge' or 'juror' because neither of these exactly represents the status or functions of the Athenian office.

It has sometimes been suggested that when an inheritance was disputed, Athenian dicasts were, as a matter of principle, prejudiced against wills and adoptions, and inclined to vote in favour of the next of kin. For example, William Wyse, in his monumental and still influential commentary on Isaeus, published in 1904, observes that 'The judges took the greatest liberties with testaments, and did not hesitate to substitute their own sympathies and preferences in place of the intentions of the deceased'.[13] In 1993 Virginia Hunter refers to 'a deeply ingrained negative attitude to adoption', which 'encouraged Athenians to challenge a deceased relative's choice of a son'.[14] And as recently as 2002 Sally Humphreys suggests that even adoptions *inter vivos* were regarded with similar suspicion.[15]

A deeply rooted prejudice against adoption would, on the face of it, be incompatible with the importance which, as we have seen, was attached in Classical Athens to the continuity of the *oikos*. What, then, is the basis of these modern interpretations? Aristophanes' *Wasps*, apparently, has a lot to answer for, in Philocleon's account of his experience as a dicast: 'And if a dying father bequeaths his heiress daughter to someone we tell that last will and testament to go soak its head, and the same to the clasp sitting so pretty over its seals, and we award that girl to whoever talks us into it.'[16] Modern scholars have sometimes been inclined to take this passage too literally, failing to recognize that, while the play does replicate many features of the Athenian legal system, it depends for its comic effect on some wild exaggerations and distortions.

The evidence from the forensic speeches is worth more serious attention, although of course the rhetorical position of the speaker must always be borne in mind. Isaeus chooses, in each case, the arguments most likely to undermine the credibility of his clients' opponents. We have seen how he uses the 'empty *oikos*' motif in support of an adoption but, like any competent advocate, he could make a persuasive case for the other side when he was hired to do so. There are no extant speeches in which an adoption *inter vivos* is attacked, but in those where his client opposes a will or testamentary adoption, Isaeus seeks to cast doubt on the authenticity of the will in question, either by alleging forgery or by questioning the testator's mental competence.

[13] W. Wyse (ed.), *The Speeches of Isaeus* (Cambridge, 1904), 177.

[14] 'Nor was it unusual for adoption, especially testamentary adoption, to incur the hostility, and so the opposition, of close kin. For as one speaker states: "All blood relatives think they have the right to dispute the succession of a son adopted by will" (Is. 3.61). Hence, a common theme running through Isaeus's orations is the opposition of *genos* and *dosis* … In other words a deeply ingrained negative attitude to adoption encouraged Athenians to challenge a deceased relative's choice of a son' (V.J. Hunter, 'Agnatic kinship in Athenian law and Athenian family practice: its implications for women', in B. Halpern and D.W. Hobson [edd.], *Law, Politics and Society in the Ancient Mediterranean World* [Sheffield, 1993], 100–21, at 105).

[15] 'Juries in the classical period regarded *diathêkai* [i.e. wills] with suspicion; even an adoption *inter vivos* that had taken place more than twenty years before the adopter's death is contested [in Isae. 2] on the grounds that it was made under a woman's influence. Other sons adopted *inter vivos* may sometimes have presented themselves before the *archon* to have their claims confirmed by *epidikasia*, even though at law they had the right to enter upon their inheritance by *embateusis* …' (S.C. Humphreys, 'Solon on wills and adoption', *ZRG* 119 [2002], 340–9, at 345–6).

[16] Ar. *Vesp.* 583–7 (Loeb trans.). This passage is taken literally by Wyse (n. 13), 222–3. A Lanni, *Law and Justice in the Courts of Classical Athens* (Cambridge, 2006), 42 describes it more sensitively as a 'recognizable though exaggerated account of the ploys litigants use to win over the jury'.

For example, the speaker of Isaeus 1 argues that, while a will can easily be forged, a blood relationship cannot be misrepresented. He appeals to the dicasts to vote in accordance with the approach they have taken in earlier cases: 'It would be very strange indeed if you voted in other cases for those who prove themselves to be either nearer in kinship to the deceased or on friendlier terms with him but in our case should decide that we, who all admit are both of these, should alone have no share in his property' (Isae. 1.38). He is not saying that the deceased's next of kin automatically have a better right to the estate than an adopted son, or that dicasts have always voted in favour of the next of kin. His point is that the dicasts must usually make a choice: *either* the next of kin *or* someone the deceased has singled out in preference to the next of kin, because he is closer in affection to them. And in fact the speaker's own case rests on his claim that he and his brothers were not only next of kin to their uncle Cleonymus but also closer to him in affection than their opponents: 'I think, gentlemen, that when anyone laying claim to an estate can prove, as we can, that they are nearer the deceased both in kinship and in friendship, it is superfluous to advance other arguments' (Isae. 1.17).[17]

Again, the speaker of Isaeus 4 argues that claims from next of kin are inherently more reliable than wills, because no one really knows whether witnesses who support a will are telling the truth: the testator himself is dead, and cannot give evidence on his own behalf as in a case of a disputed contract (Isae. 4.12). There is, of course, some truth in this; in fact, a very similar point was made more than 2,000 years later by a judge of the English Court of Appeal: 'Probate proceedings peculiarly pose problems for the court because the protagonist, the testator, is dead and those who wish to challenge the will are often not able to give evidence of the circumstances of the will.'[18] But Isaeus' argument is tendentious; the generalized statement of principle, as is often the case in Athenian forensic oratory, reflects rhetorical need rather than objective legal analysis. Even some of his clients who challenge a will are careful to express their respect for the Solonian law on freedom of testamentary disposition.[19]

Another question worth consideration is whether the Athenians might have thought that adoption *inter vivos* was preferable to testamentary adoption. There is a hint of such a view in the opening words of Isae. 7: 'I thought, gentlemen, that there could not be any dispute over adoptions of the kind made by a man personally, in his lifetime and when of sound mind, and when he has taken the adopted son to the temples, presented him to his relatives, and entered him in the

[17] Lanni (n. 16), 51, misunderstands this passage as implying a preference for 'equitable arguments' over 'legal claims'. Cf. J.M. Lawless, 'Law, legal argument and equity in the speeches of Isaeus' (unpublished Ph.D. diss., Brown University, 1991), a study of Isaeus' use of 'emerging ideas of legal equity' (based on Aristotle's discussion of *epieikeia* at *Eth. Nic.* 5.10 and *Rh.* 1.12) to deal with situations not explicitly covered by the law. Lawless finds examples of the equity argument in Isae. 1, 2, 6 and 8, but E.M. Harris, 'Open texture in Athenian law', *Dike* 3 (2000), 27–79, argues that the speaker of Isae. 1 does not appeal to principles of 'equity'; rather, this is an example of cases where the Athenian courts applied the general principles of the law to circumstances not explicitly covered by the law.

[18] Lord Justice Gibson in *Fuller v Strum*, 7 December 2001 (neutral citation number [2001] EWCA Civ 1879).

[19] '… Nobody could then have prevented Astyphilus from leaving his property (*τὰ ἑαυτοῦ*) to whomever he wished …' (Isae. 9.11); 'I myself, gentlemen, think that wills ought to be valid that somebody makes about his own property (*τῶν ἑαυτοῦ*) …' (Isae. 10.22).

public registers, carrying out all the proper formalities himself, though there might be when a man who is about to die has disposed of his property to another, in case anything should happen to him, and has sealed his wishes up in a document and deposited it with others' (Isae. 7.1). But the point that the speaker is making is not that testamentary adoption is inherently less valid, but rather that adoption *inter vivos* is (or ought to be) less open to challenge because the adoptive father has made his wishes publicly known in his lifetime instead of expressing them in a document that will not be opened until he is dead. There is sufficient indication from other cases that disposing of one's property or adopting a son by will was regarded as an appropriate option for someone who was in danger (especially if he was going to war), but who might want to revoke the arrangement if he survived the immediate risk of death. For example, Apollodorus made a will in favour of his half-sister which he apparently revoked after his safe return from the Corinthian War (Isae. 7.9).[20] Other wills made when the testator was about to set off on military service include those of Dicaeogenes II (Isae. 5.6), Philoctemon (Isae. 6.5) and Astyphilus (Isae. 9.6).

We should, of course, be cautious about drawing general conclusions from a body of evidence as limited, and as partial, as the surviving Athenian inheritance speeches. Subject to that caveat, the overall picture emerging from the speeches is one of a culture where adoption was accepted in principle as a means of providing an heir for a childless man, although a specific case might cause resentment or hostility within the family if the deceased had frustrated the expectations of his next of kin by adopting an outsider or a more distant kinsman. Moreover, when a disputed case came to court, the dicasts were likely to treat a will with some scepticism, either because the document itself might have been forged or because the testator might have been insane or acting under undue influence. But the key issue they had to address was one of reliability rather than acceptability: not whether the testator was entitled to adopt, but whether the document put forward as his will genuinely represented his wishes.[21] Despite significant social and legal differences, the basic problem remains the same for modern courts dealing with contentious probate cases. And in modern Western society the prevailing attitude to testamentary disposition is also very similar: some wills are hotly disputed, and some are proved to be fraudulent, but few people would argue that making a will was in itself a bad thing.

## EVIDENCE

I turn now from the argumentation used by Athenian litigants in inheritance disputes to a related question: the nature of the evidence they adduced in support of those arguments. It has long been recognized that the forensic speeches of the Attic orators include a wider range of evidence than would be admissible in modern

[20] Cf. Rubinstein (n. 5), 23.

[21] Cf. W.E. Thompson, 'Athenian attitudes toward wills', *Prudentia* 13 (1981), 13–25, at 14: 'If [Isae. 4.12] proves anything, it is not that Athenians were prejudiced "against devising property by will", but rather that they had reservations about the documents offered for probate … This does not rely on a prejudice which the jurors already have; instead, it seeks to inspire one in them. And, of course, it does not suggest that wills are a bad thing in themselves, merely that it is too easy to forge them.'

Anglo-American jurisdictions. Given that the Athenian courts had no formal rules of admissibility, and no procedural means of excluding irrelevant evidence, that is hardly surprising; but here, too, I shall argue that the differences between the ancient and the modern systems are not so great as has sometimes been supposed.

It is important to note that the disputed issues in Athenian inheritance cases, as in Athenian forensic oratory in general, are predominantly factual rather than legal. As we have seen, litigants never dispute the right of a legitimate son (natural or adopted) to inherit his paternal estate; but they do contest the legitimacy of a particular claimant, or the validity of a particular adoption. So, in fourth-century Athens, establishing a claim to an inheritance typically involved genealogical and other information about the claimant's relationship to the deceased, with testimony on relevant factual matters such as the introduction of an adopted son to the adoptive father's phratry. In addition, litigants frequently deployed evidence of hostile or friendly relations within the family, observance of burial rites and other religious customs, and the character of the rival claimants. Some modern commentators have characterized this evidence as 'non-legal', or 'extra-legal' or 'irrelevant', with the implication that the speaker was seeking to find favour with the dicasts on moral, or equitable, rather than legal grounds, or trying to disguise a weak legal case by milking the audience's sympathy.

Sir William Jones, the eighteenth-century jurist who published the first English translation of Isaeus, commented on the 'extraordinary latitude' in the admission of evidence by the Athenian courts, adding that we 'must never forget that the δικασταὶ were judges of fact, law and equity, with ample powers of deciding according to the justice of any case; so that the parties were permitted in general to prove whatever tended to place them in a favourable light'.[22] A similar view of Athenian litigation is found, with some variations, in the work of twentieth- and twenty-first century scholars.

M. Hardcastle argues that, in the absence of cross-examination and legal guidance to the dicasts, litigants were 'free to present all kinds of arguments in an attempt to interpret the laws in their own favour'.[23] Despite the oaths sworn by the dicasts to judge cases in accordance with the law, and by litigants to keep to the points at issue, 'irrelevant' or 'extraneous' arguments which 'had nothing to do with the legal issues of the case' are very frequently found in the speeches of the Attic orators. Hardcastle draws a distinction between 'legal' and 'non-legal' arguments used in inheritance speeches: 'In the legal section may be included those arguments which relate directly to the laws concerned with the important aspects of inheritance: the order of succession, wills, adoptions and marriage. In the non-legal section are those arguments which are not directly related to the laws or legal aspects of succession, wills, adoption or marriage. The most common of these found in inheritance speeches are those concerned with the burial of the dead and customary rites for the deceased, litigiousness and family disputes (including the conduct and attitude of the deceased to the speaker and his adversary) and services to the state.'[24]

[22] W. Jones, *The Speeches of Isaeus in Causes concerning the Law of Succession of Property at Athens, with a Prefatory Discourse, Notes Critical and Historical, and a Commentary* (London, 1779), xxxi.

[23] M. Hardcastle, 'Some non-legal arguments in Athenian inheritance cases', *Prudentia* 12 (1980), 11–22, at 11.

[24] Hardcastle (n. 23), 12.

David Cohen, who regarded Athenian litigation as a form of social competition in which legal issues were of no more than marginal significance, concludes that 'non-legal' or 'irrelevant' evidence (especially on the character of the rival litigants) was inevitably determinative in inheritance cases because of 'structural factors' in the Athenian system that made it impossible for a court to get at the 'truth': 'How could the Athenian court, forced to rely solely upon the presentation of facts and issues adopted by the litigants, within the extremely limited time frame and scope of a trial, and with the limited and unreliable means of proof available, resolve such conflicting claims except on the basis of a general judgment about their reputation, character and status as citizens?'[25]

Cohen's idea of 'litigation as feud' has been challenged by a number of scholars who reject his negative analysis of Athenian morality and point out that several features of the Athenian legal system were designed to restrain litigiousness.[26] In a study devoted specifically to the nature of the evidence put forward by Athenian litigants, P.J. Rhodes suggests that much of this evidence, while not strictly relevant to the legal issues before the court, did nevertheless form part of the 'larger story' that the Athenian courts were entitled to take into account. On this basis, he finds that, 'half of Isaeus' speeches contain nothing irrelevant, if we allow that the whole of the larger story is relevant. The other half do contain passages on the litigants' characters, but they are short passages, which play only a subsidiary part in the speeches as wholes'.[27] On Athenian litigation in general, he concludes that 'there were exceptions, but if we grant that the point includes its wider context, Athenian litigants were much better than we have allowed at keeping to the point'.[28] The implication of this, as Herman points out, is that 'Athenian litigants were not, as has traditionally been held, deliberately departing from the issue at hand … but *conscientiously observing standards of relevance altogether different from ours*' [italics added].[29]

Adriaan Lanni, who also rejects Cohen's analysis, takes a more nuanced view of the Athenian legal system as one that offered a 'contextualized' or 'case-specific' approach to justice, and 'emphasized discretionary and equitable assessments rather than the regular and predictable application of abstract, standardized rules'.[30] She nevertheless accepts Hardcastle's categories of 'legal' and 'non-legal' evidence in inheritance cases, drawing a further distinction between 'legal' arguments and those based on 'fairness' or 'justice': 'Discussion of the circumstances and context of the contested event is most prominent in suits involving a challenge to a will. Litigants often appeal to a variety of arguments rooted in notions of fairness and justice *unrelated to the formal issue of the validity of the will*. Speakers compare their relationship to the deceased with that of their opponents in an effort to argue that they have the better claim to the estate: they present evidence that they were

[25] D. Cohen, *Law, Violence and Community in Classical Athens* (Cambridge, 1995), 106–7.

[26] See e.g. M. Christ, *The Litigious Athenian* (Baltimore, 1998); E.M. Harris, 'Feuding or the rule of law? The nature of litigation in classical Athens: an essay in legal sociology', in R.W. Wallace and M. Gagarin (edd.), *Symposion 2001: Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Vienna, 2005), 125–41; G. Herman, *Morality and Behaviour in Democratic Athens* (Cambridge, 2006).

[27] P.J. Rhodes, 'Keeping to the point', in E.M. Harris and L. Rubinstein (edd.), *The Law and the Courts in Ancient Greece* (London, 2004), 137–58, at 156.

[28] Rhodes (n. 27), 146.

[29] Herman (n. 26), 149.

[30] Lanni (n. 16), 42.

closer in affection to the deceased, performed his burial rites, or nursed him when he was ill, and suggest that their opponents were detested by the dead man and took no interest in his affairs until it was time to claim his estate' [italics added].[31]

A problem common to all of these analyses, despite their differences in emphasis and perspective, is the lack of an adequate definition of 'relevance' and a consequent failure to recognize that what the writers see as 'irrelevant' or 'non-legal' evidence, or part of the 'larger story', could sometimes be directly relevant to the legal issue of the validity of a will or an adoption. Before we look at the use of such evidence in the speeches, some theoretical discussion of the legal concept of 'relevance' will therefore be helpful.

In modern English law, all irrelevant evidence is inadmissible (and some *relevant* evidence is also inadmissible, for example if it would be prejudicial to the defendant in a criminal trial). If the opposing parties to a case disagree about whether a particular piece of evidence is relevant, the question will be decided by the judge, after hearing argument from the parties or, more commonly, their legal representatives. But there is no absolute standard of relevance, nor is there a specifically legal test; the relevance of a particular fact is determined, on a case-by-case basis, by ordinary inferential reasoning based on logic and general experience. According to one theory, an evidentiary fact (a *factum probans*) is relevant or potentially relevant to the fact to be proved (the *factum probandum*) if it has some connection with it, however strong or weak.[32] The stronger the connection, the greater the 'weight' or 'cogency' of the evidence.[33] This theory has clear implications for the methodology to be adopted by students of Athenian law: if it is accepted that standards of relevance are not absolute but relative, then we cannot simply establish general categories of evidence that will or will not be relevant in all cases, or in a class of cases such as inheritance disputes.

The argumentation in several forensic speeches by the Attic orators demonstrates an awareness that factual evidence could be either 'to the point' (*πρὸς τὸ πρᾶγμα*) or 'off the point' (*ἔξω τοῦ πράγματος*).[34] In Demosthenes 54, for example, Ariston as prosecutor criticizes the behaviour of the defendant, Conon, at the arbitration, accusing him of drafting 'completely irrelevant' witness statements (*μαρτυρίας οὐδὲν πρὸς τὸ πρᾶγμα*, Dem. 54.26). Euxitheus, the speaker of Demosthenes 57, implies that the misdeeds of his fellow demesmen are relevant to his appeal against expulsion from the deme, even though the dicasts might consider them *ἔξω τοῦ πράγματος* (Dem. 57.63, 66; cf., in a case before the Areopagus, Lys. 3.44–6). These examples show not only that there was, as in modern cases, scope

[31] Lanni (n. 16), 51.

[32] 'The first rule of admissibility of evidence is that all evidence which is irrelevant is to be excluded; only relevant evidence is admissible. What is the test of relevance in this context? This is one of the more problematic questions in the subject of Evidence, even within the expository tradition. On one view, that I am inclined to favour, an evidentiary fact is relevant or potentially relevant to a probandum (i.e. a fact to be proved), whether intermediate or ultimate, if it has some connection with it – the test is: does it tend to support (or negate) the probandum at all?' (W. Twining, *Rethinking Evidence: Exploratory Essays* [Cambridge, 2006²], 121).

[33] Twining (n. 32), 193: 'The "weight" or "cogency" or "probative force" of a single evidentiary proposition, or of a mass of evidence, refers to the strength or weakness of the support or negation. Questions of relevance (is there any connection?) and of weight (how strong is the connection?) are intimately related, but it is useful to keep them conceptually distinct.'

[34] It appears, though, that only the Areopagus had a formal rule requiring litigants to speak *πρὸς τὸ πρᾶγμα*. See Arist. *Rh.* 1354a22–3.

for disagreement between the parties about the relevance of particular facts, but also that relevance was an issue to which the dicasts were expected to be alert.

What distinguishes the Athenian system from modern litigation is the lack of any procedural means of identifying and excluding irrelevant evidence. In the absence of an authoritative decision from an objective adjudicator, each of the dicasts had to make up his own mind about the relevance and cogency of all the evidence which the litigants in a particular case had chosen to adduce. Of course, we have no means of knowing the thought processes by which the dicasts reached their decisions. It seems likely that at least some of them, in any given case, might have been susceptible to means of persuasion that were not strictly rational or legal; and it would hardly be surprising if Athenian speechwriters sometimes exploited this, even in the context of a predominantly legal argument.[35] It seems reasonable to assume, nevertheless, that most experienced Athenian dicasts did have some understanding of what was relevant in a particular case, and of the relative weight of different items of evidence.

## THE RELEVANCE OF FAMILY FEUDS[36]

The use of evidence on family relations in Athenian inheritance disputes is probably best illustrated from Isaeus 9, the speech mentioned at the beginning of this paper. Here, as in the majority of the attested Athenian inheritance cases, the issues in dispute are factual rather than legal. Isaeus' client does not deny the right of a childless man to adopt a son or, by implication, the right of a legally adopted son to inherit his father's estate; indeed, he explicitly says that no one could have prevented Astyphilus from disposing of his estate as he wished (Isae. 9.11). What he does dispute is the validity of the document which his opponents propound as a will in which Astyphilus adopted Cleon's son. He argues either that the 'will' is a forgery produced in collusion by Hierocles and Cleon, or (in case the dicasts do not accept that argument) that if Astyphilus did make the will, he cannot have been in his right mind, so the will is invalid under Solon's law.

In a modern case involving allegations about a forged will, one might expect the court's attention to focus on the document itself, and the parties to rely on expert scientific evidence. But scientific evidence was not available in fourth-century Athens, and in any event it would have been difficult to prove a forgery in the absence of cursive handwriting and verifiable individual signatures. How, then, does Isaeus go about the task of persuading the dicasts that his client has the better claim to Astyphilus' estate? Like all Athenian speechwriters in all types of litigation, he relies heavily on witness testimony and the inferences to be drawn

[35] As Lanni (n. 16), 9 points out, modern lawyers use similar tactics: 'In practice, modern trial lawyers are often able to impart to the jury some information that, strictly speaking, is not relevant to proving the charge … A skilful trial attorney will exploit the flexibility in the rules of evidence to his advantage, and may even be able to suggest surreptitiously in his opening and closing statements that the verdict should hinge on legally irrelevant factors …'.

[36] D.D. Phillips, *Avengers of Blood: Homicide in Athenian Law and Custom from Draco to Demosthenes* (Stuttgart, 2008), 15 n. 2 remarks on 'the conspicuous lack of scholarly consensus on what defines a feud'. I use the term here in one of the five senses given by the *OED*, 'a state of bitter and lasting mutual hostility', without implying that Classical Athens was a 'feuding society' or that the hostile relations (*echthra*) between *oikoi* described in Isae. 7 and 9 had all the characteristics of institutionalized feud in such societies.

from it, and on more general argumentation from probability. One of the facts that he needs to prove in this case – one of his *facta probanda* – is that Astyphilus did not make a valid will in favour of Cleon's son. To support this he first produces witnesses who testify that they were approached by Hierocles with the offer of a forged will in return for a share in the estate. He also claims, again with the support of witnesses, that Cleon has made several attempts to get his son introduced into Astyphilus' phratry as his adopted son, but the *phratores* have rejected him because they know that he was not adopted by Astyphilus.

But Isaeus does not rely on that evidence alone. He also lays great emphasis on a long-standing family feud, claiming that Astyphilus' father died as the result of a blow struck by his brother, Cleon's father, during a fight, following which Astyphilus had not been on speaking terms with Cleon throughout his life. On the other hand, Astyphilus had enjoyed very good relations with his stepfather and guardian, Theophrastus, who was the speaker's father. Theophrastus had taken good care of Astyphilus' paternal estate, and handed it over to him promptly when he came of age. Moreover, the two half-brothers had always got on very well with each other. They were brought up together in Theophrastus' household, attending the same school, and Theophrastus always took them both to religious ceremonies. No doubt this evidence had an emotional appeal for the dicasts, but it was not used simply to assert a moral claim. Rather, it provides further support for the speaker's *factum probandum*, as part of his argument from probability that Astyphilus would have been unlikely to adopt the son of a lifelong enemy, and much more likely to have wanted his estate to go to a half-brother with whom he had enjoyed good relations.

Isaeus tells a similar story about a family feud in the speech he wrote for Thrasyllus, the speaker of Isaeus 7, who claims to have been adopted *inter vivos* by his mother's uterine half-brother, Apollodorus. The adoption is contested by a female first cousin of Apollodorus on his father's side, who claims Apollodorus' estate as next of kin.[37] As in the dispute over the estate of Astyphilus, Isaeus deploys a range of evidence and argumentation on his client's behalf. Witnesses testify that Apollodorus introduced Thrasyllus to his phratry and *genos* as his adopted son. Apollodorus unfortunately died before he could complete the formalities of the adoption by enrolling Thrasyllus in his deme, but witnesses also testify that he was enrolled by the demesmen in accordance with the instructions that Apollodorus had given them. This, however, was evidently not considered sufficient to make the case. Underlying this dispute, according to Isaeus, is another family feud dating back to an earlier generation. Apollodorus had been left an orphan by the death of his father Thrasyllus, and his father's brother, Eupolis, became his guardian. But Eupolis mismanaged the paternal estate and defrauded the young Apollodorus of his inheritance. Apollodorus' mother had in the meantime remarried, and her new husband, Archedamus, took pity on Apollodorus and helped him recover his property through two successful lawsuits against Eupolis. So we have, in Archedamus, another benevolent stepfather, like Theophrastus in Isaeus 9. Thrasyllus, the speaker who claims to have been adopted by Apollodorus, is the son of Archedamus' daughter. His opponent is a daughter of Eupolis, the wicked

[37] Like the speaker of Isae. 9 (see n. 2), Thrasyllus is at a disadvantage because of his matrilineal relationship to the deceased: a first cousin (*father's* brother's daughter) takes precedence over a half-nephew (*mother's* sister's son).

guardian who remained Apollodorus' enemy throughout his life. So here again, the story of the family feud helps to support the *factum probandum* that Apollodorus adopted Thrasyllus because he would have wanted to avoid leaving his estate to the daughter of his sworn enemy.[38]

In a modern contested probate case it is unlikely that evidence of a feud dating back to previous generations of the family would be accepted;[39] but, in a culture where enmity was inherited, it would have had greater significance. It would be a mistake, however, to think that evidence about a testator's relationships with his beneficiaries and others would automatically be dismissed as irrelevant by a modern court, as a brief survey of some recent cases will show. One such case, which attracted widespread media coverage in 2007,[40] was about the purported will of a farmer called Leonard Supple, in which he apparently left the bulk of his estate (worth about £18m) to his illegitimate daughter, Lynda. Stephen Supple, the testator's legitimate son by his first marriage, who was fifteen years older than Lynda, was left a mere £100 a year in the 'will', which he successfully challenged as a forgery. As mentioned earlier, one would expect expert scientific evidence to be used in support of an allegation of forgery, but in fact that is not the whole picture. The judge in the *Supple* case decided that the will was forged, partly on the basis of evidence from an expert in document and handwriting analysis, but mainly because he did not believe the account given by Lynda Supple and the witnesses of fact who testified on her behalf.

The evidence put forward by both parties included details of the testator's character and of relations within the family. Stephen Supple claimed to have had a 'normal and loving' relationship with his father, who would never have disinherited him, whereas he said that Lynda had been 'physically and verbally aggressive' towards both Mr Supple senior and his current partner. Lynda, for her part, said that her father had always planned to disinherit Stephen, because he did not help with the estate when it was being run as a stud farm. The judge concluded that Lynda was 'a cunning, amoral, selfish and vindictive woman', and also commented that the behaviour of the half-siblings towards each other was 'a cause of difficult family relationships'.

After the case was finished, Barbara Rich, one of the barristers involved, commented on the relative importance of these different kinds of evidence: 'contrary to popular impression, expert evidence given by a forensic document examiner is not necessarily determinative … document and handwriting analysis is not an exact science but uses a degree of impressionism and a qualitative scale of measurement to form opinions in many cases, and such opinions cannot usurp findings of fact

[38] Evidence of hostile family relations is also used in Isae. 1, where the speaker argues that Cleonymus' will does not represent his true wishes because it was made in anger after a quarrel with the speaker's guardian. In that speech, however, Isaeus presents a much more perfunctory narrative and relies more heavily on argumentation from probability than on witness testimony.

[39] Cf. Lord Justice Gibson (n. 18): 'After that, I fear, over-lengthy review of the material circumstances I can now express my views on the judge's conclusions. First, the picture which the judge had built up of the relationship between the Testator and Geoffrey seems to me, with all respect to the judge, a distorted one not justified by the evidence, *if the picture is viewed, as it should be, at the date of the Will*. At that date the relationship was poor. No less unjustified is the inference drawn by the judge that the Testator would never refer to Geoffrey in terms like "I hate him like poison, that Irish bastard."' [italics added].

[40] See e.g. *The Daily Telegraph* and *The Guardian*, 16 February 2007.

based on the testimony of those involved in the creation of the document and others with personal knowledge of the testator.'[41]

Not all modern disputes about wills involve allegations of forgery – in fact, these are relatively rare – but evidence about family relations can also be relevant in other situations. In one case from 2006 the testatrix was an elderly woman, Jennie Franks.[42] Her son, Morley Franks, was a solicitor, and she had asked him to draft her will. There was no suggestion that the document he produced for probate was a forgery, but it was successfully challenged by Jonathan Sinclair, one of Mrs Franks's grandsons (the son of her daughter), who was the main beneficiary of her previous will. The suspicion was that Morley had framed some of the provisions in the new will to his own advantage, against his mother's instructions and in obscure language that she was unlikely to have understood. The court heard extensive evidence about the character of the testatrix and her relations with members of the family, before deciding that the will did not represent her true intentions and that the earlier will in favour of her grandson should stand. The overall picture of Mrs Franks was of a rather cantankerous and mistrustful old woman, who changed her will several times after falling out with various family members, but who had developed a lasting rapport with the grandson whom she trusted above anyone else. The evidence on relations within the family roused serious suspicion as to whether the testatrix fully understood the contents of the later will, a suspicion which was confirmed when the court considered the circumstances in which the will had been executed.

So, in modern contentious probate cases, evidence about a testator's relationships with his beneficiaries and others is not, in itself, regarded as determinative, but it is frequently deployed because it may arouse suspicion about the authenticity of a will. Similarly, in Isaeus' speeches, we never find such evidence deployed on its own; it is used in support of what may appear to be more significant facts, such as Hierocles' offer to sell a forged will in Isaeus 9 or the formal ratification of the adoption in Isaeus 7. But it seems inevitable that this kind of evidence would have carried even greater weight in the ancient world, where scientific proof was not available.

## THE RELEVANCE OF RELIGIOUS CUSTOM

We have seen that standards of relevance are not absolute but relative. They are, moreover, culturally specific; whether there is a connection between a *factum probans* and a *factum probandum* is determined in accordance with the 'available social stock of knowledge' in a given society at a given time.[43] It would,

[41] *5 Stone Buildings News*, issue 9, July 2007, downloaded from <http://www.5sblaw.com>.

[42] *Franks v Sinclair* [2006] EWHC 3365 (Ch).

[43] Twining (n. 32), 121–2. Twining illustrates the relativity of knowledge with what he calls an 'absurd example': 'In the jurisdiction of Sodom there is an offence of fomenting earthquakes. X and Y, two homosexuals, are accused of this offence, in connection with an earthquake that occurred on 31 March. The only evidence against them is that on 30 March they committed a homosexual act in private. In our culture it is 'known' that there is no connection between homosexuality and earthquakes. But in Sodom it is known that homosexuality causes earthquakes – indeed, this is the basis for the offence. Thus in Sodom the evidence is relevant to the charge, in our culture it is not. We "know" that there is no connection between the two events.'

therefore, be inappropriate to describe a particular kind of evidence as irrelevant in the Athenian context, merely because it would not be considered admissible by the modern courts. This applies, in particular, to evidence of the observance of religious custom, such as participation in family cults or attendance at festivals, and burial of the dead, which is sometimes used in the Athenian inheritance speeches to demonstrate a claimant's relationship with the deceased.

References to the burial of the dead and conduct of the funeral rites (*τὰ νομιζόμενα*) have a particular significance in Athenian inheritance cases. In the specific cultural context of fourth-century Athens, where there was a strong expectation (albeit not a legal requirement) that *τὰ νομιζόμενα* would be performed by the person or persons entitled to inherit the estate of the deceased,[44] it is clear that a litigant could boost his claim to an estate by pointing out that he had taken responsibility for the funeral, or that his opponents had not. If he had not done so himself, he would be expected to explain why not. In Isaeus 8, for example, Ciron's grandson tries hard to convince the dicasts that he intended to take responsibility for conducting Ciron's funeral, though in the event he was thwarted by Ciron's widow and her villainous brother Diocles. The speaker of Isaeus 9 makes the point that if Astyphilus had really adopted Cleon's son, Cleon ought to have taken responsibility for conducting the funeral, instead of leaving it to Astyphilus' military comrades. (Cleon, of course, might have replied that Astyphilus' half-brother ought to have conducted the funeral himself, if he was really the next of kin, but that is easily deflected by pointing out that the half-brother was not in Athens at the time of the funeral.) There is no suggestion in either of these speeches that evidence about the conduct of the funeral was likely to be determinative, but it was among the factors that could support the speaker's case.

Evidence concerned with religious custom plays a particularly prominent part in Isaeus 8, the only one of Isaeus' inheritance speeches that does not involve a disputed will or adoption. The estate of Ciron is claimed by Isaeus' client as Ciron's grandson through a previously deceased daughter. He is opposed by a nephew (brother's son) of Ciron, who questions the legitimacy of the speaker's mother. Here, then, the speaker's *factum probandum* is that his mother was a legitimate daughter of Ciron.[45]

The speech that Isaeus wrote for this client makes much of the difficulty of proving the legitimacy of a woman who was probably born at least 40 years ago. Isaeus deals rather perfunctorily with what he calls 'the events of long ago' (*τὰ παλαιά*) – Ciron's two marriages, the first of which was to a cousin who bore him the daughter who later became the speaker's mother, then the daughter's own two marriages, the second of which produced two sons of whom one is the speaker. He becomes more expansive on the family's more recent history, while also moving farther away from the *factum probandum*. Much of the evidence he uses, with

[44] In some other ancient cultures there was a stronger link between the right of a deceased person's heir to inherit the estate and his obligation to carry out the funeral rites. Cf. H.S. Maine, *Ancient Law: Its Connection with the Early History of Society and its Relations to Modern Ideas* (London, 1861), 159: 'Among the Hindoos, the right to inherit a dead man's property is exactly co-extensive with the duty of performing his obsequies. If the rites are not properly performed or are performed by the wrong person, no relation is considered as established between the deceased and anybody surviving him; the law of Succession does not apply, and nobody can inherit the property.'

[45] Unusually, there is also a *legal* issue in this case: the speaker's opponent claims that a brother's son has a better claim to the estate than a daughter's son.

the associated argumentation from probability, is about social recognition of the family and its standing within the community. The speaker's father celebrated his marriage to Ciron's daughter with a wedding feast (γαμηλία), which he would not have done if she had not been a legitimate Athenian citizen. She was selected by her fellow demeswomen to officiate at the Thesmophoria, an honour strictly reserved for women of citizen status. And Ciron showed by his treatment of the speaker and his brother that he regarded them as his legitimate grandsons, taking them with him to all the public festivals and household sacrifices, including those to which he admitted no one outside the family.

Much of this evidence, in particular Isaeus' description of the boys sitting with their grandfather at the rural Dionysia, seems calculated to appeal to the emotions of the dicasts. It does support the *factum probandum*, the legitimacy of the speaker's mother, but the connection is not particularly strong. Modern scholars tend to interpret this in one of two ways. The first is to assume that the speaker must have been in the wrong, because he cannot bring more convincing evidence in support of his case.[46] The alternative is to give him the benefit of the doubt, recognizing that his opponents may have attacked him on a vulnerable point, knowing that stronger evidence was simply not available to him.[47] We cannot, of course, be sure of the facts, but we should be careful not to judge the evidence by anachronistic modern criteria. The Athenian dicasts not only had the advantage over us of hearing both sides of the case; they were also in a better position to assess the relevance and weight of the evidence in its cultural context.

## THE RELEVANCE OF CHARACTER

The use of character evidence in Athenian inheritance speeches is a sufficiently large and complex topic to merit a detailed separate study. In this paper, my aim is simply to suggest that character evidence could, in some circumstances, be relevant to a legal issue. I start with an example from Isaeus 4, where the relevance of the character evidence adduced by the speaker seems highly doubtful. The speech concludes with a comparison between the characters of the rival claimants. Hagnon and Hagnotheus, according to the supporter who speaks on their behalf, are law-abiding citizens who have served in the army, paid all their taxes and carried out all their civic duties, and whose father performed liturgies. They would thus be more worthy recipients of the estate than their opponent, Chariades, who was imprisoned for theft and absconded from Athens to escape justice on a subsequent charge. It is difficult to see how this could support the *facta probanda* that the will produced by Chariades is a forgery, and that Hagnon and Hagnotheus are next of kin to the deceased Nicostratus. Perhaps it is arguable, or at least an

[46] Wyse (n. 13), 603 comments dismissively on the 'inconclusiveness' of Isaeus' reasoning.

[47] See e.g. R. Lentzsch, *Studien zu Isaios* (Leipzig, 1932), 30–1: 'Und doch muss gesagt werden: wie anders sollte eigentlich der Sprecher den Beweis führen bei einer so weit zurückliegenden Angelegenheit? Ich glaube, schon aus der verhältnismässig grossen Anzahl der für die verschiedensten Dinge hergebrachten Zeugesaussagen und Zeugen … eine gewisse Berechtigung zu dem Schluss ableiten zu dürfen, dass die Mutter eine echte Tochter Kirons war.' Cf. S. Avramovič, *Iseo e il diritto attico* (Naples, 1997), 83: 'Quanti sarebbero i problemi di ognuno di noi se oggi dovessimo dimostrare senza l'aiuto dell'anagrafe fatti concernenti lo stato dei nostri nonni e genitori …?'.

Athenian might have thought so, that Chariades' alleged criminal record makes it more likely that his claim to the estate is fraudulent, but what the speaker says about Hagnon and Hagnotheus and their father has no conceivable relevance to their own claim. So its purpose, apparently, was to impress the dicasts and solicit their support – although, needless to say, this is not the only means by which Isaeus seeks to persuade them.

My second, contrasting example is from Isaeus 7, the speech delivered by Thrasyllus claiming to have been legally adopted by Apollodorus. Here Isaeus ingeniously presents the character of Thrasyllus through the eyes of the deceased Apollodorus as focalizer: 'But [Apollodorus] knew me from experience and had tested me enough. He knew exactly how I behaved towards my father and mother, that I was attentive to my relatives and knew how to look after my own affairs; and he was well aware that in my position as Thesmothete I was neither unjust nor greedy … Further, I was no stranger but his nephew, and had done him services that were not small but great; nor again did I lack public spirit … but would be keen to serve as trierarch, in the army and as *choregos*, and perform all the duties you prescribed, as he himself had done.' So, in this particular context, the speaker's character does support his *factum probandum* by making it more likely that Apollodorus would have wanted to adopt him.[48]

## CONCLUSION

There are other aspects under which this material can be studied, to which I hope to revert in a future, more comprehensive study of the Athenian inheritance system. In the meantime I shall conclude by returning to the question faced by the dicasts in the dispute about the estate of Astyphilus (Isae. 9): was Astyphilus' half-brother really the victim of a wicked conspiracy, or was he an unscrupulous impostor? We, of course, shall never know, and even the dicasts cannot have known for certain, despite their superior knowledge both of the specific case and of contemporary customs and values. After hearing both parties, they would have to decide whether the speaker's case, including his account of Astyphilus' funeral and of hostile and friendly relations within the family, was more credible than his opponent's. In a system without formal collective deliberation, each of them would have to reach his own decision about the relevance of the evidence adduced, and the relative weight to be attached to different pieces of evidence. Given that standards of relevance are not absolute, and that Athenian dicasts, unlike modern jurors or lay magistrates, had no expert guidance on the criteria to be applied, it is unlikely that each of them will have been influenced by the same factors,[49] nor should we assume that each of them reached his decision on strictly legal grounds. Even modern juries sometimes return 'perverse' verdicts against judicial guidance; and, however conscientiously the dicasts strove to comply with their oath, which required them to judge the case in accordance with the laws,[50] it seems inevitable

[48] Rhodes (n. 27), 146, sees Isae. 7.34–42 as a digression from the 'points at issue', to which the speaker returns in the conclusion.

[49] Cf. S.C. Todd, *The Shape of Athenian Law* (Oxford, 1993), 61.

[50] Cf. E.M. Harris, 'The rule of law in Athenian democracy: reflections on the judicial oath', *Dike* 9 (2006), 157–81, at 179: '… if the judges obeyed their oath, they would ignore extraneous considerations and examine just the relevant issues.'

that some of them will have been swayed by the more overtly emotive pleading towards the end of the speech, where the speaker warns them that if they uphold the adoption they will not only deny *him* justice but also act against Astyphilus' own wishes. But they would also have known that adoption, though not the ideal way of keeping an *oikos* alive, was better than letting it become extinct. So, even if they had their suspicions about the will, they would have been well aware – and no doubt the speaker's opponent reminded them of this – that by voting in favour of Isaeus' client, they would make Astyphilus' *oikos* empty, and perhaps deprive him of the heir and successor he really wanted.

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https://doi.org/10.1017/S0009838811000498 Published online by Cambridge University Press