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RESEARCH ARTICLE

The end to testamentary freedom

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Abstract
Total testamentary freedom in English law came to an end with the passage of the Inheritance (Family Provision) Act 1938, since replaced by the Inheritance (Provision for Family and Dependants) Act 1975. The Act introduced the family provision rule, which allows disinherited family members to apply to court for a financial award out of the estate. This paper critically re-examines the parliamentary proceedings, held between 1928 and 1938, which debated the merits of testamentary freedom and the need to limit the doctrine by introducing the family provision rule, then already in force in many of the Dominions. There were strong social arguments in favour of redressing unjust disinheritances, pitted against core values of personal freedom and private ownership. The paper will show that there were compelling merits in introducing the family provision rule and the Act has stood the test of time.

Keywords: law of succession; unjust disinheritance; legal history

Introduction

In July 1939, the Inheritance (Family Provision) Act 1938 (the Act) came into force. As a result, an 'Englishman's unlimited freedom to cut off his children without a penny is gone'.[1] Prior to its introduction, English testators had enjoyed total testamentary freedom, with the right to disinherit their spouse and their children. That freedom stood in stark contrast to civil law jurisdictions where the doctrine of forced heirship applies. In those jurisdictions, a surviving spouse or child has a legal right to inherit. However, the freedom enjoyed by English testators was controversial. It was argued that unfair cases arose, for example where a 'dutiful and loyal' wife had been disinherited in favour of a mistress. Bit by bit, the call to limit testamentary freedom gained traction and support with the public and with Parliamentarians, culminating in the Act.

This paper will critically reassess the Parliamentary proceedings that led to the passing of the Act. What arguments were made for and against it? What hopes and fears were expressed? How have these hopes and fear been met or dispelled in the decades since? The arguments raised in Parliament at the time closely mirror contemporary arguments about the application of the Act's successor, the Inheritance (Provision for Family and Dependants) Act 1975. The reassessment of the Parliamentary proceedings may help to find a resolution.

1. The days before 1928

(a) The legal position

Given its importance, it would be easy to assume that testamentary freedom has always been the law. However, that is not the case. For many centuries after the Conquest, English law adopted various forms of forced heirship. Exploring this historical background, Unger writes that the eventual

[1] J Dainow 'Limitations on testamentary freedom in England' (1940) 25 Cornell Law Review 337 at 337.

testamentary freedom was 'remarkable… for the mystery surrounding its origin'.[2] The development of English succession law is complex, not least given that different rules governed realty and personalty up until 1837. This section will only briefly summarise that historical background, to understand how the law developed before Parliament first debated the family provision rule in 1928.

After the Conquest, the common law began to develop. However, litigants preferred to settle their disputes in the Church court, given that it had substantive and procedural advantages.[3] It would take the common law time to develop and catch up. The jurisdictional divide between the two courts seems to have been cemented by the reign of Henry II.[4] When it came to matters of succession, the common law took jurisdiction over realty and the ecclesiastical law took jurisdiction over personalty.[5] Over time, given that much land was held on use (the forerunner to the trust), the Chancery was increasingly involved in succession disputes.

In respect of land, the common law established a feudal system. The Crown granted estates to the nobility and the church, who in turn granted lesser estates to people further down the social hierarchy. At the time, there were many types of estates that could be granted, but they generally involved some form of burden that was owed to the landlord. This could involve swearing fealty to the lord (troubling if the lord was dragged into a civil war or other dispute), providing military service to the Crown, and paying rentcharges. The common law applied the rule of primogeniture, meaning that the estate would devolve on the oldest male heir, or (if the son died before the father) the children of the male heir. In the absence of any male heirs, or children of male heirs, the land could devolve on daughters.[6] If there were no legal heirs, the estate would escheat to the lord.

There were ways around this. The lord could grant permission for the estate owner to devise the land through a will.[7] Such permission was perhaps more commonly granted to urban estates.[8] The more common way around primogeniture, the burdens of tenure, and to avoid inheritance tax, was to settle the estate on a use. This allowed the beneficiary 'to enjoy the practical advantages of landownership without the burdens'.[9] However, the Crown was not too happy about uses, as it limited inheritance tax revenue. Henry VIII, despite having a parliament full of landowners, managed to ban them.[10] This caused significant upset (in a country already seething over religious arguments surrounding the Reformation) and was a key catalyst for the Pilgrimage of Grace in 1536, the largest rebellion against Henry VIII. The situation was quickly rectified, and the Statute of Wills 1540 allowed landowners to dispose of their estates by executing a will.[11]

The ecclesiastical courts claimed jurisdiction over the succession of personalty. They also had sole jurisdiction to grant probate. However, the common law claimed jurisdiction over debt claims and, to avoid going back and forth, many succession matters were resolved in the Chancery.[12] This jurisdictional chaos continued all the way until the Court of Probate was created in 1858.[13]

[2]J Unger 'The Inheritance Act and the family' (1943) 6 MLR 215 at 215.

[3]T Haskett 'The medieval English court of chancery' (1996) 14 Law & History Review 245 at 252; also P Jason 'The courts christian in medieval England' (1996–1997) 37 Catholic Lawyer 339.

[4]W Lichtenstein 'Date of separation of ecclesiastical and lay jurisdiction in England' (1909) 3 Illinois Law Review 347 at 353.

[5]T Atkinson 'Brief history of English testamentary jurisdiction' (1943) 8 Missouri Law Review 107 at 107.

[6]F Pollock and F Maitland *History of English Law before the Time of Edward I* vol 2 (Cambridge: Cambridge University Press, 1924) p 260.

[7]C Shammas 'English inheritance law and its transfer to the colonies' (1987) 31 American Journal of Legal History 145 at 148.

[8]Pollock and Maitland, above n 6, pp 330–331; for some examples see K Kelsey Staples 'Identifying women proprietors in wills from fifteenth-century London' (2008) 3 Early Modern Women 239.

[9]JL Barton 'The medieval use' (1965) 81 LQR 562 at 577.

[10]Statute of Uses 1535.

[11]Some feudal remnants remained until abolished in the Tenures (Abolition) Act 1660.

[12]EA Haertle 'The history of the probate court' (1962) 45 Marquette Law Review 546 at 547.

[13]Court of Probate Act 1857.

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The ecclesiastical law was heavily based on Roman law, and adopted many Roman law concepts.[14] One such concept was the legitim, commonly referred to as forced heirship.[15] The ecclesiastical courts held that one-third of the personal estate had to go to the surviving spouse; one-third had to go to the children; the final one-third was free. If there was only a spouse and no children, or vice versa, the legitim was one-half. The widow was granted a special writ, *de rationabili parte bonorum*, to enforce their rights.[16]

Glanvill posited that this was the law of England from the time of Henry II.[17] However, Williams queried whether this was the law for all of England or only customary law in some dioceses.[18] For example, in *Cleaver v Spurling* the court emphasised that *de rationabili* was a customary writ in London, York, and Wales.[19] Similarly, in *Hughes v Hughes*, the court reiterated that the rule was one of custom and not the law of the land.[20] Further, *Hodsden v Harridge* noted that *de rationabili* was 'an action which seldom happens'.[21] However, these are all seventeenth-century cases and may not accurately capture the use of the rule in the early Middle Ages.

Whatever the exact position, judicial enforcement of the legitim gradually fell away. During the end of the seventeenth and start of the eighteenth centuries, several statutes were passed abolishing the rule, one for each diocese where the custom had been used. One example is 4 W & M c2, entitled, 'An Act that the Inhabitants of the Province of York may dispose of their Personal Estates by Wills, notwithstanding the Custom of that Province'. The Act notes that after 26 March 1693, the widow or children of a testator 'shall be barred' from claiming the portion of the estate they had previously been entitled to.[22] Their only entitlement was whatever they had been left in the will.

Practically speaking, testators enjoyed testamentary freedom from the end of the seventeenth century as to both realty and personalty. However, some exceptions did linger. Mortmain was one, which was only abolished in 1960, although charities and corporations had been allowed to hold land with a licence before that year.[23] For this reason it is hard to pinpoint any exact time when testamentary freedom became absolute. The Wills Act 1837 harmonised the rules on will-making, and the Act remains in force. It confirmed that testators are free to make a will of their real and personal property, and that the law does not regulate who should inherit.

(b) The arguments for testamentary freedom

The move toward testamentary freedom in the seventeenth century was not an accident.[24] It was one aspect of a much wider political and philosophical transformation, which has become known as the Age of Enlightenment. This was an exciting and turbulent time, where individual freedoms and liberties were put at the front of political and legal debate. Old ideas about divine rights of Kings were swept away. In society, the primary agent was now the individual, not the King, not the state, and certainly not the Church. In this political context, it would be impossible for English law to maintain any notion of forced heirship.

[14]RH Helmholz *The Spirit of Classical Canon Law* (The University of Georgia Press, 2010) p 17; E Kemp 'The spirit of the canon law and its application in England' (2012) 14 Ecclesiastical Law Journal 5 at 7.

[15]E Vaughan Williams *A Treatise on the Law of Executors and Administrators* vol 1 (HP & RH Small, 1859) p 2.

[16]*Rationabili Parte* (1580) BNC 159 at 159, 73 ER 916 at 916.

[17]See *La Cloche v La Cloche* (1869–71) LR 3 PC 125 at 141 per Lord Westbury.

[18]Williams, above n 15, p 2.

[19]*Cleaver & Ux' v Spurling* (1729) Mosely 179 at 180, 25 ER 336 at 337; *Honora Cason v Edward Cason the executor of her husband* (1629) Hetley 158 at 158, 124 ER 419 at 420.

[20]*Hughes v Hughes* (1665) Carter 125 at 130–131, 124 ER 867 at 871 per Bridgman CJ.

[21]*Hodsden v Harridge* (1668) 2 WMS Saunders 64 at 67, 85 ER 693 at 698.

[22]4 W & M c 2, s 2.

[23]Charities Act 1960, s 38(1); see the Mortmain and Charitable Uses Act 1888, s 1(1).

[24]R Croucher 'How free is free? Testamentary freedom and the battle between "family" and "property"' (2012) 37 Australian Journal of Legal Philosophy 9 at 11.

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For example, the Enlightenment philosopher John Locke argued that property was the reason behind government and laws.[25] It was of central importance. This philosophical school sees private ownership as a natural right, something people were entitled to absolutely; the law was simply there to ensure that the community could function together harmoniously.[26]

Testamentary freedom flows from this. John Stuart Mill wrote that 'the ownership of a thing cannot be looked upon as complete without the power of bestowing it, at death or during life, at the owner's pleasure'.[27] Property cannot be truly owned unless the owner can dispose of it through a will. The lack of such power makes the person a custodian rather than an owner.

Testamentary freedom was not merely philosophical. The Age of Enlightenment spurred the Industrial Revolution and society shifted from agrarian to industrial; from land to commodities. Wealth was measured in stocks and shares rather than acres. Testamentary freedom was closely entwined with this development. It was seen as a method to drive entrepreneurship and promote personal ambition.[28] There are two sides to this coin. First, if a person knows that they are free to dispose of their property, they may be more inclined to accumulate wealth and then leave it whomever they find deserving. Secondly, if a child knows that they are not guaranteed any inheritance, they are therefore incentivised to go out and create their own fortune.

Testamentary freedom also gave testators the right to favour one family member over another. The freedom to do so was justified on the basis that different family members – and indeed friends and associates – may have a stronger or lesser claim to inherit.[29] Their age, their conduct, their personal circumstances (such as their own marriage, or children, and their employment status), whether they have a disability or other needs, may incline a testator to give to each according to what the testator believes they need or deserve.[30] Children providing care for their parents or grandparents is perhaps a prime example of where a testator should be free to favour the caregiver over children who did not provide any assistance.[31]

Mill wrote along similar lines, saying that 'I cannot admit that parents should be compelled to leave to their children even that provision which, as children, I have contended that they have a moral claim to … others may have claims superior to theirs'.[32] The testator must have that choice because, for example, two children may have ended up in very different circumstances. Whilst some forced heirship jurisdictions, such as Spain, make some allowances for that, it still does not go far enough to allow for personal circumstances.

Three main justifications for testamentary freedom can be identified. Philosophically, private ownership was the basis of the Enlightenment England that emerged in the seventeenth to nineteenth centuries, which spearheaded the industrial revolution and global capitalism. Practically, testamentary freedom played a role in promoting entrepreneurship and industry, incentivising wealth creation as no child could inactively wait around for an inheritance; they had to make their own fortune. Socially, testamentary freedom allowed testators to favour beneficiaries who might have a stronger moral claim, based on their personal circumstances.

(c) There were, however, some problems

The justifications for testamentary freedom presented above, whilst persuasive, only really apply to one segment of society. This is middle-class families, and in particular the men in those families. The

[25]J Locke *Two Treatises of Government* (P Laslett (ed), Cambridge: Cambridge University Press, 1988) p 350.

[26]F Facchini 'Complex individualism and legitimacy of absolute property rights' (2002) 13(1) European Journal of Law and Economics 35 at 36.

[27]JS Mill *Principles of Political Economy* (Longmans, Green, & Co, 1909) Bk 2, ch 2, [4].

[28]*Banks v Goodfellow* (1869–70) LR 5 QB 549 at 564 per Cockburn CJ.

[29]Ibid.

[30]Consider the observations in Mill, above n 27, Bk 2, ch 2, [4].

[31]J Tate 'Caregiving and the case for testamentary freedom' (2008) 42 UC Davis Law Review 129 at 135.

[32]Mill, above n 27, Bk 2, ch 2, [4].

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upper classes still found their wealth in land, which was generally settled on trust and thus bypassed much of the inheritance process. As the nineteenth century wore on, the working classes became more financially stable, but their income was unlikely to be sufficient to spread around beyond the immediate family. Further, whilst Enlightenment philosophy promoted individualism, the Victorian Parliaments actually intervened considerably in business. Legislation was passed to regulate fair pay, working hours, health and safety, and the legalisation of trade unions. On the social front, Parliament made provisions for the free education of young children and improved the air, water, and sanitation quality in the cities. Parliament did much more beyond that.

As one side of society promoted capitalism, another side was asking serious questions about fairness and equality, not just financially but also socially. Key developments included the Married Women's Property Acts of 1870 and 1882, which allowed married women to own property in their own right, rather than ceding ownership to their husbands on their marriage. A growing debate questioned whether testamentary freedom was a good idea and whether a testator, often a husband and father, should be stopped from unfairly and capriciously disinheriting his wife or child. Whilst many women would be financially protected by a marriage settlement, lessening their individual concern about disinheritance, this did not address the wider social issues of financial inequality and the precarious situation faced by widows and children. As will be seen, this was a key factor in Parliament's decision to introduce the family provision rule, though Parliament, as discussed below, failed to provide a unified definition of what exactly was an unfair disinheritance.

Finally, whilst there may have been a philosophical and economic rationale for testamentary freedom, no one recommended the disinheritance of spouses and children. The law still uses various rules and conventions to subtly favour wills that leave property to family members.[33] The courts have always been more sceptical of the validity of wills that disinherit family; for instance, testamentary capacity is only presumed if the will 'appears rational'.[34] If not, the executor must prove capacity. Brook makes the compelling argument that the inheritance tax regime imposes practical limits on testamentary freedom, by making gifts to the testator's spouse or civil partner tax exempt.[35] Finally, addressing the disinheritance of family members, the Lord Chief Justice in *Banks v Goodfellow* noted that 'a moral responsibility of no ordinary importance attaches to the exercise' of testamentary freedom.[36] It was not, nor should it be, a light or easy decision to disinherit a spouse or a child.

The debate about the merit of testamentary freedom and means to limit it through legislation gained serious traction. At the turn of the twentieth century, jurisdictions in New Zealand, Australia, and Canada began introducing legislation to mellow out the harshness of absolute testamentary freedom.[37] These statutory safeguards became known as the family provision rule. If a spouse or a child had been disinherited, they had the right to petition the court for a financial payment out of the estate. The court had discretion whether or not to make that award. Generally, the financial payment was limited to assist with the applicant's maintenance, which generally relate to their day-to-day expenses.[38] The family provision rule was seen as a fair balance between respecting testamentary freedom and guarding against unfair disinheritances. These developments in the Dominions beyond the seas lead us to 1928.

2. 16 May 1928

On Wednesday 16 May 1928, a debate took place in the House of Lords. The protagonist was Viscount Astor, who is mostly known as the husband of Nancy, Viscountess Astor, the first woman to take her

[33]MB Leslie 'The myth of testamentary freedom' (1996) 38 Arizona Law Review 235 at 236.

[34]*Re Key* [2010] EWHC 408 (Ch), [2010] 1 WLR 2020 at para [97] per Briggs J; *Austen v Graham* (1854) 8 Moo PC 493.

[35]J Brook, 'Testamentary freedom – myth or reality?' (2018) 82(1) Conveyancer and Property Lawyer 19 at 29; see generally the Inheritance Tax Act 1984.

[36]*Banks v Goodfellow*, above n 28, at 563 per Cockburn CJ.

[37]Consider the Family Protection Act 1895 (New Zealand).

[38]*Re Coventry* [1980] Ch 461 at 485 per Goff LJ; *Ilott v The Blue Cross* [2017] UKSC 17, [2018] AC 545 at para [14] per Lord Hughes.

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seat as an MP in 1919. Viscount Astor moved a motion to establish a select committee to investigate whether English law should adopt the family provision rule, by now enacted in most of the Dominions.

Viscount Astor was motivated by what he referred to as the 'very real hardships' that 'now occur under the law as we have it'.[39] Indeed, he indicated that he had received a copious amount of correspondence from the public on this topic. Viscount Astor recounted some examples. The most obvious was that of a man who leaves his estate to his mistress rather than his wife. One example was this: 'I have another case of a wealthy man, who left £1,500,000 to his illegitimate children and their mother and only £30,000 to his legitimate children and his lawful wife'.[40] He went on to emphasise that the legitimate children will often side with their mother because of the unfairness caused to her. These things cause no end of grief and hurt for the parties involved.

Viscount Astor surveyed a wide range of common law jurisdictions. He noted that 'in most of the English-speaking countries the law makes it impossible for the type of hardship and injustice to arise'.[41] That English law essentially stood on its own in allowing for complete testamentary freedom is important, as it made the argument to introduce the family provision rule less revolutionary.

Viscount Astor addressed two key objections to the family provision rule.[42] First was the philosophical argument that a testator should be free to dispose of their own property. Secondly was the practical argument that a testator is better placed than the law to determine which amongst her or his family is most deserving of the inheritance. These two objections are clearly valid in a critique of forced heirship, but Viscount Astor argued that they were unpersuasive against the family provision rule. The rule merely allows the court to scrutinise the facts and determine whether someone is in need of financial support. Viscount Astor made a key distinction between 'arbitrary disinheritance' and 'disinheritance on reasonable grounds'.[43] The latter should clearly be allowed, but the former should not. If an arbitrary disinheritance takes place, the court should have the power to intervene.

It is fair to say that Viscount Astor's motion was not well-received.[44] The first in a long line of critics was Viscount Haldane, who said the whole proposal was 'unworkable'.[45] There are some noteworthy elements to Viscount Haldane's objections. First came a strange and, without further context, highly questionable attack on the judiciary. He said that the family provision rule is one he would 'much deprecate being thrust on the Judges, simply because they cannot know and they are very apt to do injustice'.[46] It is remarkable that any parliamentarian would suggest that judges are 'apt to do injustice'! Nonetheless, the argument is clear. It is not a judge's role to rewrite wills based on what they might think is fair. That decision should only be entrusted to the testator. More widely, the objection raises an important point of judicial diversity. If a judge makes a value judgement in respect of an unfair disinheritance, will that decision be influenced by the judge's socio-economic background, gender, and so on?[47]

One can assume that Viscount Haldane's early work as a barrister and later position as Lord Chancellor had influenced his opinion of the judiciary. Viscount Haldane engaged in fair amount of 'idealising' about his life work and was considered to be 'morally pretentious'.[48] His personality and personal experiences clearly coloured his views of the establishment and the judiciary.

[39]Viscount Astor, HL Debate 16 May 1928, vol 71 § 38.

[40]Astor, above n 39, § 39.

[41]Astor, above n 39, § 44.

[42]Astor, above n 39, § 44–45.

[43]Astor, above n 39, § 45.

[44]Dainow, above n 1, at 346.

[45]Viscount Haldane, HL Debate 16 May 1928, vol 71 § 46.

[46]Haldane, above n 45, § 47–48.

[47]There is much commentary on this point, but consider E Rackley 'What a difference difference makes: gendered harms and judicial diversity' (2008) 15 International Journal of the Legal Profession 37.

[48]S Wexler 'The urge to idealize: Viscount Haldane and the constitution of Canada' (1983–84) 29 McGill Law Journal 608 at 613.

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Interestingly, Viscount Haldane suggested that if the family provision rule were to be introduced, he would rather the power be given to the ecclesiastical court than the civil court; arguing that the 'Bench of Bishops … could do it better and more humanely'.[49]

Lord Buckmaster, another former Lord Chancellor, also expressed doubts.[50] He suggested that the motion was based on two hypotheses: first, the presumption that women are dependent on their husbands for financial support; secondly, the presumption that there are a lot of situations where the wife has been financially cut off through disinheritance. His Lordship accepted that the first presumption was broadly true but argued that the efforts of Parliament should be on gender equality rather than tinkering with inheritance rules. Lord Buckmaster explained that his 'idea is that men and women should be socially and economically equal, free and independent … and that when a woman is left a widow society ought to be so organised that she should be just as able to protect herself as a man when his wife dies'.[51] He accepted that this reality would be a long time coming, but the family provision rule would be unlikely to assist in any meaningful way. Indeed, even today there will no doubt be a difference in opinion on whether that aspiration has been realised.

The serving Lord Chancellor, Baron Hailsham, made a series of historical observations, noting that English law had deliberately moved away from the strict inheritance rules of the Middle Ages.[52] Baron Hailsham noted the old legal saying that 'hard cases make bad law … and one has to be careful in trying to deal with a hard case not to establish worse wrongs than those which you are trying to cure'.[53] Baron Hailsham discussed some of the examples that had been raised, such as husbands disinheriting their wife in favour of their mistress, noting that these are exceptions and that the courts should not be second-guessing a testator's decision. Ultimately, Baron Hailsham argued that it would not be in the public interest, indeed it would be 'undesirable', to have 'in every case the washing of family linen in public'.[54] Baron Hailsham intimated that there was no public appetite for such a rule and went so far as to ask Viscount Astor to withdraw the motion.[55]

Perhaps surprisingly for a Tory (most of whom would go on opposing the family provision rule right to the end), Viscount Cecil was more open to the idea. He noted that a husband has legal, financial obligations towards his wife in his lifetime, including after a divorce, and it would be a good idea to investigate whether those obligations should continue after the husband's death.[56] He further agreed with Lord Buckmaster about the merits of pushing for gender equality but suggested that this reform might be of benefit in the short term.

The debate has to be read in the context of the day. Viscount Cecil, for instance, says that it is 'desirable' for a wife to leave employment to manage the family home, but this is used as an argument to support giving the wife some financial protection once the husband has died.[57] Viscount Cecil's views are clearly old-fashioned by today's standards, but one has to be careful not to judge the past with that measuring stick. Viscount Cecil appears a progressive person for the time, and would go on to win the Nobel Peace Prize for his part in establishing the League of Nations.

Finally, Lord Merrivale held firm that the proposal was 'revolutionary' and not something he would support.[58] This view carried some weight, as Lord Merrivale was a Lord Justice of Appeal and served as President of the then Probate, Divorce and Admiralty Division of the High Court.

[49]Haldane, above n 45, § 47.
[50]Lord Buckmaster, HL Debate 16 May 1928, vol 71 § 50.
[51]Buckmaster, above n 50, § 50.
[52]Baron Hailsham LC, HL Debate 16 May 1928, vol 71 § 53–54.
[53]Hailsham, above n 52, § 54.
[54]Hailsham, above n 52, § 56.
[55]Hailsham, above n 52, § 57.
[56]Viscount Cecil, HL Debate 16 May 1928, vol 71 § 58; see the Matrimonial Causes Act 1973.
[57]Cecil, above n 56, § 58.
[58]Lord Merrivale, HL Debate 16 May 1928, vol 71 § 60.

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Viscount Astor closed the debate. Given that the Lord Chancellor had opposed the motion, and that the next general election was only a year away, it was clear that nothing would come of this. His Lordship withdrew the motion.[59]

Some key points can be taken from this first skirmish. From the letters sent to Viscount Astor (which he claimed were many), it was clear that the public had an opinion about disinheritance. Viscount Cecil foreshadowed one of the key arguments that was to come in later debates, namely that fathers and husbands should not be allowed to renege on their legal obligations to their children and wives merely by dying. Spaht posits this as her key justification for the civilian forced heirship system, since it 'helps preserve and strengthen the family by reminding parents of their societal responsibilities'.[60] Furthermore, looking at testamentary freedom from a US perspective, whilst individualism is widely embraced in the US, almost all states do provide legislative protection for spouses, meaning a surviving spouse cannot be fully disinherited.[61] Even in the US, the right of the family can outweigh the right of the individual. When a surviving spouse today makes an application, the court will consider any award by reference to what the spouse might have obtained as a divorce settlement, which further cements the family obligation justification for the family provision rule.[62]

The opponents also raised arguments that would be rehashed in the later debates and which still carry some weight today. The proposal would interfere with private ownership. It would make a public spectacle of family disputes. Ultimately, will judges be able to make fair decisions about innately private matters? The *Daily Mail* headline on 29 July 2015 shows that these concerns are alive and well, nearly a century later: 'Who are judges to tell us who we can leave our money to in our wills!'[63]

3. Wills and Intestacies (Family Maintenance) Bill

Despite the cool reception in the House of Lords, there was public support for the idea. The *Daily Mail*, then as now interested in matters of succession law, said the following day that there is 'much to be said for the proposal'; the principal argument was that husbands should not be able to renege on their legal obligations to their family merely by dying.[64] Viscount Astor was also undeterred. On 1 August 1928, Lord Askwith (on the Viscount's behalf) moved the Wills and Intestacies (Family Maintenance) Bill. On 6 March 1929 Viscount Astor reintroduced the Bill. However, nothing came of either attempt.

(a) Debate in the House of Commons, 20 February 1931

It was only in 1931 that the first debate was held on yet another version of Bill. The House of Commons debated whether the Bill should be referred to a Joint Committee. The motion was moved by Eleanor Rathbone, the independent member for the Combined English Universities. Ms Rathbone emphasised that the Bill was the product of the previous attempts as well as careful consultation with 'legal and social experts'.[65]

Ms Rathbone posited that testamentary freedom had been introduced 'with too great completeness and at a time when the utter subjection of wife and children to the will of husband and father was fashionable'.[66] It was emphasised that it was patently unfair that a husband had legal obligations to

[59]Viscount Astor, HL Debate 16 May 1928, vol 71 § 61.

[60]K Shaw Spaht 'Forced heirship changes: the regrettable revolution completed' (1996) 57 Louisiana Law Review 55 at 58.

[61]Tate, above n 31, at 160; consider a spouse's right of election in s 5-1.1-A in the New York Estate, Powers & Trusts consolidated laws.

[62]Inheritance (Provision for Family and Dependants) Act 1975, s 3(2).

[63]See Max Hastings (*Daily Mail*, 29 July 2015) www.dailymail.co.uk/debate/article-3178080/MAX-HASTINGS-judges-tell-leave-money-wills.html (last accessed 11 March 2020).

[64]"The widow's inheritance' (*Daily Mail*, 17 May 1928) p 12.

[65]Eleanor Rathbone MP, HC Debate 20 February 1931, vol 248 § 1641.

[66]Rathbone, above n 65, § 1642.

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his wife and children in his lifetime but could avoid them altogether through disinheritance when he died.

However, the Wills and Intestacies (Family Maintenance) Bill more resembles forced heirship than the family provision rule. Had it been adopted, English succession law would have looked radically different. The Bill proposed leaving a surviving spouse half of the chattels, a capital grant of the lesser of half the estate or £1,000, and the income to half the net estate (after the capital grant had been paid) if there were no children or one third of the net estate if there were children. If there were children, they would be entitled to the income of one third of the net estate if there was a surviving spouse or one half of the net estate if there was no surviving spouse. Unless the child had a disability, their right to the income would cease on their 23rd birthday (or two years after finishing full-time education, if earlier than their 23rd birthday). The spouse's income would be limited to £2,000 per annum and the child's income would be limited to £300 per annum. If the spouse or child already had income of their own, the most they could claim from the estate would be whatever sum would bring them to the ceiling. They could not claim the income if their personal income exceeded the ceiling. The ceiling was there to ensure that the payment was actually received for the purpose of maintenance, not as a windfall inheritance. The court would be entitled to cancel an entitlement either if the spouses had been separated for two years or if the spouse or child was undeserving, such as being in prison. Finally, a testator would be allowed to contract out of the requirements, but would need the court's consent to do so. This would be on the basis of showing that other financial provisions have been made for a surviving spouse and the children, be it a family trust, a life insurance policy, or a marriage settlement.

This is a convoluted scheme and it is not surprising it attracted a great deal of opposition. Still, the justification for the design was actually quite logical. By and large, it mirrored a surviving spouse's entitlement when their partner died intestate.[67] The intestacy entitlements have been amended since 1931, but still follow a similar pattern to what was proposed in the Bill. Today, if there are children, a surviving spouse is entitled to personal chattels, a lump sum cash payment (currently £250,000), and half of anything above. The children take the other half.[68] In 1931, the spouse similarly would have been entitled to personal chattels, a lump sum cash payment (then £1,000), and the income from anything above. Whilst complex, the provisions in the Bill are therefore understandable.

Ms Rathbone provided some examples to illustrate why the Bill was necessary.[69] She emphasised that these were merely snapshots from the multitude of examples that had come to her attention. The amount of public correspondence to MPs does show a genuine interest in this topic, which undoubtedly spurred on the proponents of the Bill. There was the wife who discovered that her husband had left everything to the local barmaid, with whom he had clearly had an affair. There was the second wife who discovered that her husband had left everything to his already wealthy children from his first marriage. Ms Rathbone posited that these kind of events were far more common than anyone might suspect. It was right that there be some form of redress for those who had been unfairly disinherited.

Labour's Mary Hamilton MP argued that the idea of marriage was shifting from one of women's subjugation to their husbands to one of a partnership, where the work of a wife and mother in the family home ought to be better recognised.[70] Ms Hamilton MP explained she was pleased that no-one had 'attacked it as being a feminist Bill, for it certainly is not that', since it applied equally to men and women, but it played a role in promoting the idea of marriage as an equal partnership with shared obligations and ownership of family property.[71] It follows that it is appropriate for the surviving spouse to have legal rights to the property of the deceased spouse. Labour's James Lovat-Fraser MP, who emphasised his credentials as a feminist, also supported the Bill as it promoted

[67]Administration of Estates Act 1925, s 46.
[68]In the absence of children, the surviving spouse takes the whole estate.
[69]Eleanor Rathbone MP, HC Debate 20 February 1931, vol 248 § 1650.
[70]Mary Hamilton MP, HC Debate 20 February 1931, vol 248 § 1667.
[71]Hamilton, above n 70, § 1668.

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the idea that marriage is to be an equal partnership. The aim of the Bill was also to combat 'the selfish and tyrannical father who holds the dread of disinheritance over wife and children'.[72] One example was found in a play then running in the West End, based on the true courtship between the poets Robert and Elizabeth Browning. As in that case, a father might threaten to disinherit his child if they did not marry whomever the father wishes. John Llewellyn MP objected that having seen a play was not a sufficient reason to vote for a Bill.[73] That may well be true, but there is strength in the argument that using the threat of disinheritance to control one's family was morally unjust.[74]

The objections to the Bill were many. There was a procedural objection, namely that a change of this magnitude should come from a Government Bill rather than a Private Member's Bill.[75] Further, there was a question of scope. How many families would actually benefit from this Bill? The opponents suggested they were not many, and the provisions would disproportionally affect the vast majority who already provided for their families.[76]

The main objection was the practical difficulties that came with splitting up an estate in the way envisaged by the Bill. Giving a spouse or child the right to income meant that the administration of the estate would carry on for a long time, certainly many years, which could be hugely inconvenient.[77] The Bill had the potential to complicate what would otherwise be simple probate proceedings. A will leaving the entire estate to the surviving spouse (suggested as the most common form of will) might be upset if there were young children, given their right to the income from one third of the net estate after the chattels and lump sum had been paid to the surviving spouse.[78] Here, the estate would have to be broken up and part of it held on trust. This would cause great hardship to many families, such as business owners and farmers, where it might be impossible to keep the business going because of the need to invest property to generate income. In addition, further objections were made against the arbitrary income ceilings and the fact that genuinely deserving children over the age of 23 would not benefit anyway.[79] Furthermore, for those with means, it would be fairly easy to circumvent the Bill by settling property on trust.[80] This meant the hardships would particularly affect lower-income families.

The Solicitor-General provided some critical observations. First, the key distinction to intestacy is that intestacy proceeds on a legal fiction: what do we presume a testator would have done had he or she made a will? Hence the safeguards for surviving spouses and children. This is different from where a testator deliberately makes his or her wishes known by executing a will. The effect of the Bill is to say 'that he ought never to have done it, and set aside that which he has done'.[81] The Bill provided for a fixed inheritance but gave the court the right to cancel it if certain conditions were met and also allowed the testator to contract out of it. This would generate litigation the moment someone thought the will was unfair. The example given by the Solicitor-General was that of a married man who wished to make provision for this mother; the gift might be defeated if the wife or children applied to court for their statutory inheritance, and in a small estate, the whole might be lost to legal fees.[82] The Solicitor-General suggested that the family provision rule used in the Dominions led to less litigation, as a claimant would only go to court if advised that they had a strong claim.[83]

[72]James Lovat-Fraser MP, HC Debate 20 February 1931, vol 248 § 1673.
[73]John Llewellyn MP, HC Debate 20 February 1931, vol 248 § 1673.
[74]Edith Pictor-Turbervill MP, HC Debate 20 February 1931, vol 248 § 1680.
[75]Sir Samuel Roberts MP, HC Debate 20 February 1931, vol 248 § 1658.
[76]Captain Bourne MP, HC Debate 20 February 1931, vol 248 § 1654.
[77]Bourne, above n 76, § 1656.
[78]Sir Samuel Roberts MP, HC Debate 20 February 1931, vol 248 § 1660.
[79]Roberts, above n 78, § 1659.
[80]Frederick Llewellyn-Jones MP, HC Debate 20 February 1931, vol 248 § 1664; Sir Cooper Rawson MP, HC Debate 20 February 1931, vol 248 § 1670.
[81]Sir Stafford Cripps Solicitor-General, HC Debate 20 February 1931, vol 248 § 1688.
[82]Cripps, above n 81, § 1689.
[83]Cripps, above n 81, § 1690.

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Nonetheless, despite the many criticisms, the House voted to refer the Bill to a Joint Committee to give it further consideration.

(b) Debate in the House of Lords, 3 March 1931

The House of Lords considered the same motion. The Lord Chancellor emphasised that this was merely a procedural motion on referring the Bill to a Joint Committee; it was not a second reading of the Bill itself.[84] This, however, did not go down well, with Lords lining up to criticise the proposal to establish a Joint Committee before actually debating the underlying merit of the Bill.[85] The Lord Chancellor concluded by saying that he was 'rather appalled at the violence of the language used' in a debate on a procedural motion.[86] Despite that, the motion was passed and the Bill was referred to a Joint Committee.

(c) The Joint Committee Report

The Joint Committee Report was issued on 17 June 1931.[87] The Committee did not want to express any views on how many spouses and children had been unjustly disinherited, but posited that it was a 'substantial' number.[88] The Committee's view of the Bill was not entirely favourable, noting that the 'provisions of the Bill are complicated and would undoubtedly lead to greater expense' and that the Public Trustee had evidenced the 'difficulty of carrying out certain provisions of the Bill'.[89] In conclusion, the Committee did not endorse the Bill and recommended its rejection on any future vote in the Commons, but equally argued that the Commons should give serious consideration to any attempt to introduce a family provision rule along the lines seen in the Dominions.[90]

Some key points can be taken from this debate. There was clearly a public appetite to do something about unfair inheritances. One of the main arguments was about the legal obligations of spouses and parents. Whilst the Bill was gender neutral, the concern was about husbands disinheriting their wives and fathers disinheriting their children. It was clear that this could be done on rather spurious grounds, and perhaps it was right for the law to guard against that. Still, this Bill was not the right way to go. It was too impractical and there is great merit in the objections raised about unnecessarily complicating probate proceedings, not least with the need to break up estates to hold them on trust to generate income. This would be particularly difficult, if not catastrophic, for families where the estate comprised of a business or a working farm, which simply cannot be broken up or invested.

4. Powers of Disinheritance Bill 1933–34

Following the Committee's recommendations, a new Bill was introduced two and a half years later. On 18 December 1933, the Commons moved the Powers of Disinheritance Bill, which was later renamed the Inheritance (Family Provision) Bill 1934.

The Inheritance (Family Provision) Bill 1934 proposed a family provision rule along the lines of what was being used in the Dominions, and looked fairly similar to the Bill that eventually became law four years later. Clause 1(1) allowed a surviving spouse or a child who was left 'without adequate provision for his or her proper maintenance education or advancement in life' to apply to court for an award to that effect from the net estate. The key restriction was that the financial provision had to go to

[84]Lord Chancellor, HL Debate 3 March 1931, vol 80 § 204.
[85]Lord Buckmaster, HL Debate 3 March 1931, vol 80 § 206; Lord Danesfort, HL Debate 3 March 1931, vol 80 § 210.
[86]Lord Chancellor, HL Debate 3 March 1931, vol 80 § 212.
[87]Report from the Joint Committee on the Wills and Intestacies (Family Maintenance) Bill, 17 June 1931.
[88]Report, above n 87, [3].
[89]Report, above n 87, [6].
[90]Report, above n 87, [7].

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maintenance, education or advancement. Clause 1(3) said that the court could refuse the application on 'any ground which the court thinks sufficient to disentitle' the applicant from an award.

In an editorial written by Eva Hubback, the President of the National Council for Equal Citizenship, the Bill was commended. Hubback wrote that it had been 'uniformly well received by the public and the Press' and emphasised its universal application; it was not a 'Women's Bill'.[91] The editorial raised a number of key points. First, everyone earning a wage (ie the working classes) mandatorily had to pay national insurance and pension contributions.[92] This meant that surviving spouses had some financial protection. This is important. As noted earlier, testamentary freedom was really an issue for the middle classes. The working classes obtained these statutory protections at the start of the twentieth century (which were thoroughly overhauled with the post-War welfare state) and the upper classes had their estates held on trust. This Bill could therefore plug an important gap. Beyond that, Hubback noted that England stood 'almost alone among civilized countries' in allowing total disinheritance. The problem addressed by the Bill was 'real' and the number of families affected was 'considerable', although, of course, low in comparison to the total number of people who died each year.

The Commons debated the Bill on 27 April 1934. The focus was on considering a number of amendments. One amendment related to the date on which the Bill would come into effect; either the date the Bill received Royal Assent or 1 January 1935.[93] Mr Macquisten MP argued for 1 January 1935 on the optimistic basis that testators, knowing of the new rule, would put their wills in order, meaning that no cases would ever have to be brought before the court.[94] The Commons voted for the Bill to come into force on the day it received Royal Assent. However, the delay to put affairs in order seems to be what actually happened with the 1938 Act, which came into force one year after receiving Royal Assent. Any hope that testators would sort out their wills so as to make the Act redundant has clearly been quashed.

Another amendment sought to introduce the word 'legitimate' before the word 'child', excluding any illegitimate children from applying to court. The amendment was rejected, mainly because the law as it stood interpreted child as only referring to legitimate children.[95] It was a bizarre feature of the law that an illegitimate child could legally be regarded as the child of no one. Thankfully, the issue of legitimacy has been resolved by later statutes.[96]

A further amendment related to the question of age. As it stood, provision would be made for children for the remainder of their lives. The amendment would stop the provision when the child turned 25 or married, whichever happened first. Tory MP Sir Annesley Somerville moved the amendment 'in the interests of the initiative of the younger generation'.[97] As seen, this was one of the key arguments for testamentary freedom. A child who knows they can be disinherited is motivated to seek their own fortune, whereas one who knows they will be maintained by inheritance might not take the same initiatives in life. Mr Macquisten MP said that it 'is an absurd thing to think that grown men should look to an inheritance instead of depending on their own efforts'.[98] Ms Rathbone MP spoke against the amendment, giving the example of daughters who have spent a long time caring for their parents and are unable to return to the workforce. It would be unjust to exclude children in those sorts of circumstances. Further, the Bill gave discretion to the court, and there was nothing that said that children would get a life-interest out of the estate.[99] The amendment was rejected.[100]

[91]E Hubback 'The Inheritance Bill' (*The Times*, 26 April 1934) p 10.

[92]See the Old-Age Pensions Act 1908; Widows', Orphans' and Old Age Contributory Pensions Act 1925; National Insurance Act 1911.

[93]HC Debate, 27 April 1934, vol 288 § 2029.

[94]Frederick Macquisten MP, HC Debate, 27 April 1934, vol 288 § 2045.

[95]HC Debate, 27 April 1934, vol 288 § 2071.

[96]Family Law Reform Act 1987, s 19.

[97]Sir Annesley Somerville, HC Debate, 27 April 1934, vol 288 § 2071.

[98]Frederick Macquisten MP, HC Debate, 27 April 1934, vol 288 § 2072.

[99]Eleanor Rathbone MP, HC Debate, 27 April 1934, vol 288 § 2075–2076.

[100]HC Debate, 27 April 1934, vol 288 § 2084.

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This Bill was the first that provided for a family provision rule along the lines that remain recognisable today. Whilst there was a great deal of momentum behind it, the Bill suffered the same fate as most Private Members' Bills. There was insufficient parliamentary time to take it any further. However, it was probably clear that the family provision rule would become law at some point. The only question was when.

5. Inheritance (Family Provision) Bill 1937–38

Despite the detailed debate in 1934, no further Parliamentary time was devoted to the Bill. A new Bill, proceeding on a similar path, was introduced in 1937. This one would become law.

(a) Second reading in the House of Commons

The second reading took place on 5 November 1937. The Bill was moved by Stanley Holmes, the Liberal MP for Harwich. Mr Holmes MP suggested that those objecting to the Bill were 'individualists'; but it was emphasised that in their lifetime, a spouse or parent had legal obligations as to the other, and it was wrong for this right to be abrogated merely because of death.[101] Again, the proponents based their arguments on examples of unfairness caused by absolute testamentary freedom. A spouse and children may be left destitute and, perhaps due to age or simply being away from the job market, will find it difficult to restart their careers. Whilst there was an embryonic welfare system for working class families, a general welfare state was still many years away, and could probably not have been envisaged by the proponents of the Bill. Ms Rathbone MP built on this by emphasising some of the social merits of the Bill.[102] As she pointed out in a manner that hindsight has made even more persuasive, it was 1937 and the government was spending its money on armaments, not social reforms and welfare. This Bill would help achieve some social justice at very limited cost to the government.

The objections mostly followed what was now a familiar pattern, including the argument that allowing adult children to apply was wrong as it 'will encourage idleness and that it will discourage initiative and an independent spirit'.[103] Tory MP Sir George Davies delivered a passionate defence of personal liberties, and decried the Bill for interfering too far.[104] Tory MP Alan Dower similarly objected to the Bill, arguing that most testators would have a clear reason for leaving someone out of their will; furthermore, any court order would take money away 'from someone whom the testator definitely wished to receive it'.[105]

However, interestingly, many of the opponents kept saying that they wanted to see forced heirship along the civil law or Scottish lines.[106] It is not clear why those arguments were made, as they very much go against the idea of individual freedom. At least it provides certainty. Perhaps it was a safe way to object to the Bill whilst still seeming as though they were in favour of some redress to those badly affected by disinheritance, knowing that forced heirship would never get through the Lords, which in the days before the House of Lords Act 1999 was dominated by hereditary Tory peers.

A further concern was that the Bill would increase litigation and 'divide families'.[107] This has become painfully obvious in many of the cases that have arisen under the Acts. The family provision rule provides a forum for families to air their dirty laundry in public, which was objectionable. Finally, perhaps the strongest objection was that 'the Bill gives the court practically no guidance as to how they are to decide the disposition of various estates'.[108] The Solicitor-General had previously criticised the

[101]Stanley Holmes MP, HC Debate 5 November 1937, vol 328 § 1292.
[102]Eleanor Rathbone MP, HC Debate 5 November 1937, vol 328 § 1309–1310.
[103]Alan Dower MP, HC Debate 5 November 1937, vol 328 § 1305.
[104]Sir George Davies MP, HC Debate 5 November 1937, vol 328 § 1324–1325.
[105]Dower, above n 103, § 1302.
[106]Consider Patrick Spens MP, HC Debate 5 November 1937, vol 328 § 1318.
[107]Dower, above n 103, § 1302.
[108]Arthur Heneage MP, HC Debate 5 November 1937, vol 328 § 1297.

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Bill on the same ground, arguing that a case cannot 'depend upon the kind of breakfast the judge has had'.[109] The concern about lack of guidance is discussed further below.

(b) Comments in the press

The Bill received favourable press mention. The *Daily Mail* said the Bill would bring an end to 'dead men's malice'.[110] Ms Rathbone MP wrote an editorial lauding the Bill, in which she was introduced as a 'pioneer of the movement to combat the injustice of malicious wills'.[111] Ms Rathbone referred to the 'scandal of unjust wills, by which loyal and blameless wives or families are left destitute through the whim or cruel spite of those from whom they naturally expected help'. She went on to say that 'many of the cases brought to my notice reveal a degree of spite and vindictiveness which is almost incredible'. This injustice clearly affected people, which is what brought about the change.

(c) Amendments in the Lords

The House of Lords made some final amendments, including that the Bill would only apply to the estates of people who died domiciled in England.[112] Further, the Lords allowed a daughter to apply if she had a disability, even if she was also married.[113]

6. Inheritance (Family Provision) Act 1938

The Bill received Royal Assent on 13 July 1938, and came into force one year later. Perhaps, as Mr Macquisten MP had argued for, time was set aside for testators to amend their wills, so as to avoid the Act affecting their estates.[114] One anonymous opponent fired a final salvo in the *Daily Mail*, saying that Parliament has made 'an amazing blunder', by not distinguishing between legitimate and illegitimate children.[115] This criticism is strange as the issue had already been addressed in Parliament, and it is likely the Act only applied to legitimate children anyway, at least until the Family Law Reform Acts of 1969 and 1987.

The Act allowed applicants to apply to court where a will did not leave enough for their maintenance. Applications could only be made against estates of people who died domiciled in England. The Act does not mention Wales, but perhaps that was implied. Four categories of people could apply: a surviving spouse; an unmarried daughter or a daughter who could not maintain herself due to a disability; a minor son; or an adult son who cannot maintain himself due to a disability. They could not apply if the will left at least two-thirds of the income of the net estate to the surviving spouse. The upper limit of an award by the court was two-thirds of the income from the net estate if there was both a surviving spouse and children; or one-half if there was only a surviving spouse or children. In small estates, valued at less than £2,000, the court could instead award a capital payment. The income payments would cease: if the surviving spouse remarried; if the daughter married or the disability ceased so she could maintain herself; when a son turned 21; or when a son ceased to have a disability so he could maintain himself.

(a) Summary of changes made by the Inheritance (Provision for Family and Dependants) Act 1975

The 1975 Act opened up the classes of applicants to any child (regardless of age, marital status, or disability), anyone the testator treated as a child or was otherwise maintaining. Later, cohabitants

[109]Solicitor-General, Report of Standing Committee A, 23 March 1937, col 31.
[110]'MPs unite to frustrate unjust wills' (*Daily Mail*, 30 April 1938) p 11.
[111]Eleanor Rathbone MP 'When this Bill becomes law you can't disinherit your family' (*Daily Mail*, 10 May 1938) p 10.
[112]Lord Russell of Killowen, HL Debate 23 June 1938, vol 110 § 246.
[113]Russell, above n 112, § 247.
[114]Frederick Macquisten MP, HC Debate, 27 April 1934, vol 288 § 2045.
[115]'Parliament's blunder' (*Daily Mail*, 18 July 1938) p 4.

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who had cohabitated in a relationship for at least two years could also apply. The court was given more flexibility on what property orders they could issue, and there is no limitation now on the amount of capital or income that the court can award. The court has the power to impose conditions, but the award will not automatically end just because of a change in circumstances. Importantly, the 1975 Act also applies to intestacy, allowing the class of applicants to claim if they do not benefit on intestacy. This has been particularly useful for unmarried partners and stepchildren (who have no legal entitlement at all on intestacy).

7. Assessing Parliament's hopes and fears

This section will consider some of the key arguments made for and against the Act in Parliament, to assess their relative merits.

(a) Promoting individualism and entrepreneurship

The critics of the Act argued that it did not fit with the fundamental philosophies of the Enlightenment, on which the modern English legal and political system is based. At the heart is individualism. All but perhaps the most extreme liberals and libertarians accept the need for a state to govern society and ensure harmony and cooperation; yet modern England was built on the right of the individual. Freedom of speech and the press, and other personal freedoms, were enshrined in the Bill of Rights 1689. When one thinks of human rights and personal liberty, testamentary freedom might not be at the forefront. However, it is closely entwined with that philosophy.

The critics of the Act defended testamentary freedom. The doctrine respects private property and ownership, which is also protected in the European Convention on Human Rights.[116] The European Court of Human Rights noted that 'right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property', closely entwining testamentary freedom with the notion of private ownership.[117]

The critics also fell back on the argument that private ownership, and testamentary freedom with it, incentivises industry and commerce. When inheriting from your parents is not guaranteed, seeking one's own fortune is paramount. However, it is doubtful that the family provision rule undermines industry and entrepreneurship, not least since the court is now allowed to consider the applicant's conduct and earning capacity when determining whether to make an award.[118]

Testamentary freedom has come into the firing line for perpetuating wealth inequality in society.[119] However, Gold argued that forced heirship does not really provide a solution either, in part because it keeps the assets within the family.[120] It is really not clear that inheritance reform will effect great changes in wealth inequality.[121] Ultimately, it is a matter of personal freedom and a distrust of any notion that the government is allowed to interfere in your personal affairs.

The Act does impact on private ownership, however, so the next question is whether that impact is justified. Parliament firmly held that it was in order to redress unfair disinheritances.

(b) Redressing unfair disinheritances

The main argument in favour of the Act was that many people had been unfairly disinherited. This raises two questions. First, what is meant in this context by unfairness? Secondly, how many people were actually affected by unfair disinheritances?

[116]ECHR, Protocol 1, Art 1.
[117]*Marckx v Belgium* (1979–80) 2 EHRR 330 para [63].
[118]Inheritance (Provision for Family and Dependants) Act 1975, s 3.
[119]Consider W Blackstone *Commentaries on the Laws of England* (Oxford: Oxford University Press, 2016) Bk 2, ch 23.
[120]J Gold 'Freedom of testation' (1938) 1 MLR 296 at 297.
[121]J Wedgwood *The Economics of Inheritance* (Pelican, 1939) p 13.

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The proponents of the Act did not provide a unified definition of an unfair disinheritance. Indeed, this is clearly a subjective concept, and at first glance it may seem bizarre to legislate to redress something inherently undefinable. However, the examples given in Parliament may provide a framework definition that can at least assist in justifying the Act.

The starting point might be a social expectation that the will favours the spouse and children. Already in Roman law, 'society and the law took a dim view of the upsetting of natural affection and of the transfer of property away from those who had a natural claim on it'.[122] An unfair will may be a will that removes the testator's property away from his or her immediate family. However, this in itself is insufficient as a definition, as it would suggest that a will excluding a spouse in favour of children is still fair, meaning the Act overextends itself by allowing the spouse to claim against the estate.

The definition of an unfair will must rather extend to examining the motives of the testator. This, however, is fraught with danger, as each person has their own personal proclivities. Is it right for the court to exercise a moral value judgement, especially when the testator is dead and cannot provide further justification for their actions? The examples used in Parliament, some of which have been replicated in later case law, provide an insight into how Parliament justified giving the court this power.

The prime example repeatedly used in Parliament was that of a husband disinheriting his wife in favour of a mistress. Whilst judges have described such wills as 'immoral', they have been upheld on the basis that free will trumps moral condemnation.[123] This is perhaps unjust as it bypasses the moral (if not legal) obligations that spouses have toward one another. Such obligations can survive divorce, so why not death?

This justification is closely linked with the idea of control. One example was alluded to in the Commons, namely the relationship between the poets Robert and Elizabeth Browning.[124] Her father disapproved of the marriage and disinherited her. The drama around their courtship was turned into a play called 'The Barretts of Wimpole Street', which inspired Mr Lovat-Fraser MP to vote in favour of the Bill. It was certainly true in Victorian England that husbands and fathers wielded enormous power and influence over their family, by virtue of controlling the family money and threatening disinheritance on anyone who disobeyed their orders. It is doubtful that even a hardened individualist would not agree that some redress is appropriate in such a case.

This argument was perhaps stronger in the days before the welfare state and the shift in social attitudes towards marriage and the role of women in society but it does remain valid today. At the time, it was common for wives to leave employment to manage the family home; there is something inherently unfair about a husband then leaving his whole estate to, for example, a mistress. Such events might be less common today, as divorce is more socially acceptable, but other examples remain true. For example, many children act as carers for their parents, which may well have an impact on the child's employment and ability to pursue promotion and advancement; again, it seems inherently unfair for that child to be disinherited.

The notion of control remains today in cases where a child has been disinherited because the parent, rationally or not, disagrees with the child's conduct. It raises of question of whether parents should be permitted to disinherit children on the basis of personal moral values, which for any number of reasons may be different from the child's moral values. In *Ilott v The Blue Cross*, a daughter was disinherited because the mother disapproved of her daughter's husband, with whom the daughter had eloped.[125] In *Wellesley v Earl Cowley*, a daughter was disinherited following a family rift caused, at least in part, by the daughter drinking and taking drugs.[126] None of these examples generate an

[122]E Champlin *Final Judgments: Duty and Emotion in Roman Wills, 200 BC–AD 250* (University of California Press, 1991) p 15.

[123]Consider *O'Neall v Farr*, 30 SCL 80 (1844), 83–84 (South Carolina).

[124]James Lovat-Fraser MP, HC Debate 20 February 1931, vol 248 § 1673.

[125]*Ilott*, above n 38.

[126]*Wellesley v Earl Cowley* [2019] EWHC 11 (Ch).

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obvious answer whether the child should or should not inherit. There will no doubt be a wide range of opinions on that front. They do, however, demonstrate that disinheritances happen for many reasons, and some of those reasons will be stronger than others.

Linked to control are other circumstances in which a testator did not make provision for a family member who should fairly inherit. In *Ubbi v Ubbi*, a married father did not provide for two children born from this mistress in his will, and it was clearly appropriate that some provision be made for them.[127] The 1975 Act also extends the family provision rule to intestacy, allowing the court to make an award to cohabitants and stepfamily, who have no entitlement in law.[128] It is widely accepted that there are multiple reasons why a person dies intestate, and perhaps up to 40% of people in the UK do not have wills.[129]

Finally, it is clearly appropriate that the law provides some safeguards for children lacking mental capacity or who have a disability that prevents access to the job market. The argument that testamentary freedom drives entrepreneurship must be contrasted with the reality that some people, through physical or mental disabilities, cannot reasonably access the job market and seek their own financial independence.

An unfair will disinherits a family member who has some moral claim to the inheritance. There will be numerous reasons why a moral claim exists, such as the family dynamics or the testator having used the family wealth in a coercive manner. It remains bizarre, however, that Parliament pushed through a significant change to succession law without better defining what it meant by an unfair disinheritance.

Parliament also pushed the Act through saying that numerous people were affected by unfair wills. This was backed up in part by the voluminous amount of correspondence that parliamentarians said they received from the public. However, Patrick Spens MP opposed the Bill because there was no evidence of the number of so-called hard cases that the Bill was designed to redress.[130] Wedgwood suggested that no more than 6.5% of property disposed of by wills actually left the family.[131] The figure would certainly suggest that forced heirship would be wholly unnecessary and even the family provision rule might turn out to be a fundamental reform to assist a very small number of individuals. It is really not clear how many so-called unfair wills existed, nor can it be known how much correspondence parliamentarians actually received relating to this topic. Still, one must assume that Parliament would not devote so much time and effort to this issue unless it was felt that it affected a real number of people.

(c) Judicial discretion and family dramas

These are the strongest objections to the Act. It generates litigation and, whilst a disinheritance might be caused by a pre-existing family dispute, the Act has the potential to create or amplify rifts and estrangements. This is potentially counterproductive. Indeed, in some cases the court has transferred property to claimants to create a 'clean break' between various family members.[132] The Act cannot always be a tool to resolve family disputes or promote reconciliation. However, in the end it is doubtful that the Act does more harm than good.

When litigation happens, the Act gives a lot of discretion to the judges. Whilst judges are generally trusted to make decisions, the nature of the Inheritance Act disputes are more social and moral rather than questions of pure law, questions of liability, or whether one act was causatively linked to another, and the like. This concern remains today, despite many decades of case law applying the Act.

One reason for allocating jurisdiction to the Chancery Division was that it was small and its judges worked in close proximity, suggesting that they would be able to 'develop uniform canons' for the exercise of the discretionary powers.[133] Gold posited that judges would cure this through

[127] *Ubbi v Ubbi* [2018] EWHC 1396 (Ch).
[128] Administration of Estates Act 1925, s 46(1).
[129] Law Commission *Making a Will* (Consultation Paper 231) 1.1.
[130] Patrick Spens MP, HC Debate 5 November 1937, vol 328 § 1312.
[131] Wedgwood, above n 121, p 110.
[132] *Musa v Holliday* [2012] EWCA Civ 1268 para [27] per Sir Nicholas Wall.
[133] F Cownie and A Bradney 'Divided justice, different voices: inheritance and family provision' (2003) 23 LS 566 at 582.

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precedent.[134] However, in reality the courts have mostly gone in the opposite direction. In *Ilott v The Blue Cross*, Lade Hale noted that the Inheritance Act (in this case the current 1975 version) 'gives [judges] virtually no help' in deciding applications.[135] Whilst the 1975 Act lists factors for the judge to consider, such as the applicant's financial position, their health, and social circumstances, the family provision rule is still hugely dependent on a judge's discretion. These factors were not listed in the 1938 Act. Furthermore, the 1975 Act created concurrent jurisdiction between the Chancery Division and the new Family Division, with some suggestion that the judicial approach to applications differ in the two Divisions, based on the different ethos of property law and family law.[136] MPs' concern back in the 1930s does seem warranted.

There is no easy resolution to this concern. Judges approach applications carefully and consider all the relevant facts. However, one cannot escape the fact that they are making value judgements. The Supreme Court decision in *Ilott* is therefore noteworthy for suggesting that judicial intervention should be cautious. Sloan noted after *Ilott* that proponents of testamentary freedom were 'in a stronger position', as the Supreme Court had unequivocally reiterated the centrality of testamentary freedom.[137] Lady Hale wrote that testamentary freedom 'seems also to enjoy strong support from public opinion', whilst the public recognised the need for the law to 'interfere in certain circumstances'.[138] Citing studies, Lady Hale posited that there were various reasons in favour of legal interference: keeping property in the family; ensuring fairness to partners or children with disabilities; and providing their just deserts to partners or children who had given their time and effort to care for their partner or parent.[139] The latter two are certainly captured by the Act.

Today, the courts appropriately recognise testamentary freedom but exercise their statutory duty to guard against unfair disinheritances. Many of the fears of those who objected to the Act have actually come true, such as disastrous litigations tearing families apart. However, the benefits carry more weight, as it has allowed the court to provide redress to people who had been unfairly and unjustly disinherited.

Conclusion

It took 10 years of Parliamentary proceedings to enact the family provision rule, starting with Viscount Astor's motion in May 1928. Whilst it was a Private Member's Bill, the proponents and opponents generally fell according to party lines. The Liberal and Labour MPs supported it, seeing it as a necessary social reform to combat unjust disinheritances. Tory MPs generally opposed it, citing an interference with personal freedom and highlighting a host of practical problems that could be caused by litigation under the Act.

Whilst both hopes and fears about the Act have materialised, in the end the Act has stood the test of time. Although since its enactment in 1938 there has been a fundamental shift in the family structure and in the role of women in society, as well as the roll-out of the welfare state, the underlying aim of the Act, to guard against unfair disinheritances, remains true and valid today. Replacing the Act with forced heirship would be anathema to English legal culture but repealing the Act would remove that redress currently available to family members unfairly and unjustly left out of a will or not entitled on intestacy. The proponents of the Act back in 1928–1938 have been vindicated, and the objections raised made the draft Bills stronger, and have ensured that the courts continue to respect the fundamentality of testamentary freedom.

[134]Gold, above n 120, at 301.
[135]*Ilott*, above n 38, para [58] per Lady Hale.
[136]Cownie and Bradney, above n 133, at 571.
[137]B Sloan 'Testamentary freedom reaffirmed in the Supreme Court' (2017) 76 CLJ 499 at 502.
[138]*Ilott*, above n 38, para [53] per Lady Hale.
[139]*Ilott*, above n 38, para [57] per Lady Hale.

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