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Forcing the issue

Kathryn Purkis provides a comparative view of family provision in the British Isles

IN BRIEF

▶ The different countries of the British Isles have varied approaches to mitigating capricious or unfair wills. Scotland and Jersey are thinking about the fairness and workability of their forced heirship arrangements, but neither has an appetite for throwing these away in favour of English-style statutory provision.

Some legal questions engender a single clear answer, others are more nuanced. What is the optimal arrangement for family provision when a will cuts out close kith and kin? This is a minority concern—because about two-thirds of people across the UK die intestate—but it is still important. The issue is currently being discussed in Jersey and Scotland, both of which have systems of forced heirship. There is limited appetite there to adopt the English solution.

Context

These days, many English and Welsh lawyers think of freedom of testation as a hallmark of a free and liberal society, and cannot imagine how things could be otherwise in their jurisdiction. But they used to be: Glanville, writing in 1187, stated that English law ensured the entitlement of a deceased's wife and heir to one-third each of his chattels; although these rights were less and less frequently enforced (when sued for, it was usually in the ecclesiastical courts). It was only in 1742 that they ceased to be enforceable, and some 90 years later, it was explicitly declared by the Wills Act 1837 that a person was entitled freely to dispose of all his moveables. So far as concerned real property, which was from the 13th century generally incapable of being devised at all, the freedom of testation enabled in part by the Statute of Wills 1540 and then more widely by the Tenures Abolition Act 1660, remained subject to a widow's right of dower. This right was a life interest in one-third of any freehold estates capable of being inherited from her husband. Under the Dower Act 1833, this right became capable of being overridden by a disposition made by the husband. The last vestiges of limiting rights of this kind were overturned by the Mortmain and Charitable Uses Act 1891 (Thomas, M and Dowrick, B, "The Future of Légitime—Vive la Difference!", *Jersey and Guernsey Law Review*, October 2013).

Thus the only period in English legal history when freedom of testation—and so the testatory power of a *paterfamilias*—was uncircumscribed ran from 1891 until the enactment of the Inheritance (Family Provision) Act 1938, on which the later Inheritance (Provision for Family and Dependants) Act 1975 was based: just under 50 years. Interestingly, Thomas and Dowrick note that the original impetus for the enactment of the 1938 Act came from New Zealand, then Australia and Canada (except Quebec); in these colonies, perhaps because testators were relatively unrestrained by bonds of extended family or close social observation to make appropriate provision for their spouse and dependent children, a need emerged for statutory regulation which was then adopted into the law of England and Wales.

Why, then, was pure freedom of testation so short-lived? The answer is that most systems of law have long recognised the family as a social unit, and has accorded importance to familial rights and duties; and to some extent have had regard to the fact that property often has the character of family property, in that it will usually either have been inherited from, or earned with the effort or support of, the wider family. Some jurisdictions have responded to this imperative by so-called forced heirship provisions, others by ensuring the existence of a legal jurisdiction that enables a circumscribed, remedial judicial discretion to be exercised if the terms of the will are not regarded as satisfactory. These are but two different approaches to dealing with the same question. The law of England and Wales offers the latter; so too the Isle of Man and (further afield), the overseas territories of Cayman and BVI. But forced heirship arrangements exist both in Scotland and in Jersey, as matters stand. Guernsey has swept away the relevant customary law and, in 2011, replaced the last elements of it with a statute providing for family provision at judicial discretion: emulating England and Wales almost unthinkingly, as Sir de Vic Carey, former Bailiff observed in "The Abandonment of the Grand Principles of Norman Custom in the Law of Succession of the Bailiwick of Guernsey", *Jersey and Guernsey Law Review*, February 2014.

Jersey

There are forced heirship provisions in Scotland and Jersey because both are mixed law jurisdictions with a strong civilian heritage. Both approach the question of family entitlements in much the same way. The civilian approach in all property matters begins by drawing a distinction between real and personal property—using the appropriate language, immoveable (in Scotland, heritable) and moveable property. In summary, the current position (a detailed history or account being beyond the scope of this article) is that, in Jersey:

▶ Although since 1926 there has—otherwise—been unrestricted freedom of testation in respect of immoveable property, a spouse remains entitled to claim *douaire*, a lifetime *usufruit* (a burden over but not an interest in land) over one-third of the deceased's immoveable property (or its proceeds, if alienated during the marriage or civil partnership). The right exists at customary law for widows, and since 2014 the more extensive customary law usufructory rights of a widower have been reduced by statute co-extensively

with dower, and also were granted to civil partners of either sex. Such rights may be excluded by ante-nuptial contract and are lost on divorce or dissolution, on separation, or by "undeserving" conduct: broadly, on desertion;

- *Légitime* (a customary law right now also enshrined in statute) may be claimed over the moveable estate of a deceased testator by a surviving spouse or civil partner, and by issue of all degrees: in summary, a spouse may always claim household effects, after which one-third of the moveable estate may be claimed by the spouse and one-third by the issue if both categories are populated; if not, then two-thirds may be claimed by the spouse or the issue as the case may be.

Scotland

In Scotland, the position is similar, save that:

- there is now no dower over heritable property; and
- so far as moveables are concerned, the terminology for a claim by a spouse is to "legal rights", and by issue, "legitim"; the share of the moveable estate subject to such claims is one-half, unless both legal rights and legitim are claimed, in which case it is two-thirds.

Changes?—Jersey

Both jurisdictions have in recent years been undergoing a certain amount of legal soul-searching as to whether the status quo adequately serves those left behind after the death of the testator. So, in Jersey, in July 2014 a proposal was mooted to extend the scope of the right of dower or statutory dower from one-third of the immoveable estate to the whole of the matrimonial home. This brings the testate entitlement closer to the position on intestacy where a *usufruit* over the whole is granted, if there is not, pursuant to the intestacy rules, already an absolute entitlement. It has been met with broad approval by those who support forced heirship, reflecting as it does the economic reality that many if not most spouses would not be able to afford to claim their dower, because of the difficulty in paying rent to the (other) beneficiaries. But not everyone does. The 2016 Consultation Paper on the 7th set of amendments to the Trusts (Jersey) Law 1984 is only the most recent of a succession of public calls for the general abolition of *légitime* (albeit that the limit of the 7th amendments would be to make it clear that dispositions into trust by Jersey-resident settlors will successfully avoid *légitime*). The preference of the modernisers is that *légitime* (and presumably dower too) should be replaced with a statutory jurisdiction akin to the 1975 Act. But it should be noted that, although the States took an in-principle decision to effect such reform in 2003, this was reviewed at the highest levels during 2009, and, ultimately, it was rejected; it was felt that further consideration could be given to adapting the extant system and moreover, an approach based wholly on litigation would be uncertain, costly, and potentially acrimonious, the more undesirable for being in a family context.

Changes?—Scotland

Also in 2009, the Scottish Law Commission published, after public consultation, a report on succession intended to provide the basis for a new bill amending the current legal position, but in terms which retain the overall architecture of Scottish law. Put briefly, they were for a spouse's legal rights to be extended over the whole estate, heritable and moveable, and to constitute a fixed share, quantified at 25% of what that spouse would have inherited on intestacy, which would itself vary depending on others entitled and the size of the overall estate. The 25% share was arrived at because it was assessed as setting a fair balance between familial claim and freedom of testation.

As for the deceased's issue, two alternatives were mooted: there should either be an equivalent fixed share of 25% of the intestacy entitlement by way of legitim, or an entitlement limited to dependent children to claim a capital sum for maintenance, if and only if the principal beneficiary did not otherwise have a legal obligation to maintain them, which would be defeasible at 18, or 25 if in education or training (under Scottish law there is an obligation of maintenance or aliment towards one's children).

Interestingly, the Scottish consultation exercise revealed that claims of this kind, whether to legal rights or to legitim, were uncommon. Nonetheless it was strongly felt that protection for a spouse against disinheritance should be retained, as incidents of the relationship between the spouse and the testator, which had been voluntarily assumed and retained. Furthermore, as STEP Scotland submitted to the Commission, it was widely felt that a fixed share system was of fundamental importance, by providing clarity for spousal rights without resort to a court process.

So far as legitim was concerned, though (as borne out by the second option mooted for that), the strength of support for the merits of claims by issue was lower overall; much lower where there was a surviving spouse. Reasons for this included the facts that an estate is ever more likely to be self-made than consist of "family money", and by the time most people now inherit from their parents, they are in middle age themselves. This is consistent with the English Law Commission's findings in its 2015 consultation paper *Intestacy and Family Provision on Death*, in which it was considered whether the 1975 Act should be amended to improve the prospects of adult children's claims. However, the jurisdictions are very far apart on fundamentals, one respondent to the latter paper observing that "[t]he ability of a parent to cut out a child goes to the root of basic English law".

Conclusions

The Scottish Law Commission's proposals on these matters have not, as yet, become statute, and the Scottish government continues to consult, particularly on the potential impact of legal rights or legitim on farms and crofts, hitherto exempt if immoveable. But the proposals should be of interest to traditionalists in Jersey, because they address the criticism that *légitime* is an ineffective protection of rights because it can be avoided by converting personal property into real property (if that is even necessary, as for most people, the bulk of their spouse's or parents' estate consists of the matrimonial or parental home). It also addresses the different complaint that because non-freehold property is classed as moveable, the scope of family provision varies depending on the character of the main home.

The 1975 Act certainly offers a sophisticated, bespoke solution to the issue of family provision on succession, and has the advantage of applying where reasonable provision has not, in the circumstances, been made for an eligible applicant under the intestacy rules. However, as most recently illustrated by *Illot v Mitson* [2015] EWCA Civ 797, [2016] 1 All ER 932 *et al* (concerning an estate worth only £486,000 in which there have been five court decisions, two in the Court of Appeal, with a sixth being imminent in the Supreme Court), it comes at a price in terms of uncertainty, delay, cost, and as mentioned above, potential acrimony.

These factors constitute sound arguments in favour of retaining forced heirship provisions, where these are otherwise part of a jurisdiction's legal heritage, if with inventiveness they can be adapted to address the needs of modern families—the evidence from Scotland suggests no clamour for a 1975 Act equivalent. And it could be suggested that the mere fact of forced heirship existing in and beyond the British Isles tends to support a relatively low threshold when assessing reasonableness of extant provision under the 1975 Act. **NLJ**

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