Testamentary Freedom – Myth or Reality?

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Testamentary freedom has been cited as an integral part of the law of England and Wales; the Law Commission has described the idea of forced heirship as 'alien to our legal tradition'.[2] Yet despite the only statutory limitation to testamentary freedom being the Inheritance (Provision for Family and Dependants) Act 1975, there are other subtler statutory influences on our testamentary dispositions, such as the provisions of the Inheritance Tax Act 1984.

The first part of this paper will be historical in nature, briefly considering the context in which testamentary freedom was first granted and the restrictions that were placed on that freedom during the 20th Century. Against this background the inheritance tax principles will then be set, so that a greater understanding can be gained as to why particular dispositions receive more favourable tax treatment. Finally the changes to inheritance tax that came into effect in April 2017 will be examined, with consideration of the effects of those amendments on testamentary dispositions.

Historical developments

During the mediaeval period no testamentary dispositions of freehold land were permitted[3] and instead the law of primogeniture developed so that generally there was only a single heir to land, at a time when it was important both that military rights of tenure were held by one person and when manorial lords were loath to see land sub-divided against their will.[4] Whilst this was only a custom, and therefore could be subject to local variations, it should be noted that this was not merely the default provision to take effect in the absence of an election to the contrary (in the way that intestacy provisions are now) but was the law itself.

The only freedom of testation that existed was limited to dispositive rights over chattels. If a man were to die leaving a wife and child, his chattels were divided according to the "tripartite rule" which required one third to go to the spouse and one third to the children. If a man were to die leaving either spouse or children then they would receive half. Lifetime advances were to be brought into

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[2] Law Commission, *Intestacy and Family Provision Claims on Death* (Law Comm No. 331, 2011) para 1.21

[3] Sir F Pollock and F W Maitland, *The History of English Law before the Time of Edward I,* Vol II (2nd edn, Cambridge University Press 1898) 302. It was not until the Statute of Wills in 1540 that it was possible to devise an estate in land by will

[4] ibid, 279, although note that it was not necessarily the first born.

account, but apart from that in each case it was only the final portion (half or third as appropriate) that could be freely distributed, and even then this was usually given to the Church.[5]

This system was in force until the late 17th Century in Yorkshire[6] but seems to have ceased elsewhere in England much earlier. Adherence did vary around the country[7] and the origin of the rule appears to be no more than custom and practice,[8] but the proving of wills was operated by the ecclesiastical courts and within these courts the prevalence of local customs was far greater. It should be noted that the echoing of this division in the medieval laws of intestacy[9] suggests that it was an accepted division of personal property. It is clear that for much of the middle ages it was only in the absence of spouse and issue that one's chattels could be freely distributed on death.

The process by which the law arrived at a state of testamentary freedom has therefore been a gradual one, with full testamentary freedom only coming in 1891 with the passing of the Mortmain and Charitable Uses Act.[10] Notwithstanding this, the law of succession to land remained with its own peculiar quirks until 1926, for example the fact that express words were necessary to disinherit the heir at law,[11] and the common law rules of descent also continued to govern the disposal of real property in intestacy situations until the same date.[12] Therefore although the principle of testamentary freedom is often quoted as being a fundamental part of the law of succession in England and Wales, it has evolved slowly over time, as people gained greater control over both real and personal property.

Family Provision Legislation

Once this background is understood, the introduction of legislation to enable close family members to claim from an estate in 1939[13] does not seem to be as ground breaking as it may have felt at the time. The Inheritance (Family Provision) Act 1938 was the culmination of a decade of parliamentary consideration of the extent to which a limitation should be placed upon testamentary freedom,[14] with the focus throughout being on the conflict between the need for the testator to leave his family with

[5] Joseph Dainow, 'Limitations on Testamentary Freedom in England' (1940) 25 Cornell L. Rev. 337, 341
[6] (n3) 348
[7] (n3) 350
[8] (n3) 352
[9] (n3) 360. See also Stephen Cretney, *Family Law in the Twentieth Century: A History* (OUP 2005) 479 for an analysis of the intestacy laws from 1670 onwards
[10] Roger Kerridge, *The Law of Succession* (13th ed, Sweet & Maxwell 2016)
[11] *Halsbury's Laws* (2016) Vol 102, para 257
[12] Stephen Cretney, *Family Law in the Twentieth Century: A History* (OUP 2005) 479
[13] Under the Inheritance (Family Provision) Act 1938, brought into force on 13 July 1939
[14] Joseph Dainow, 'Limitations on Testamentary Freedom in England' (1940) 25 Cornell L. Rev. 337, 345-347; Stephen Cretney, *Family Law in the Twentieth Century: A History* (OUP 2005) 485-496

sufficient property for their maintenance, whilst maintaining individual liberty and keeping the courts out of private family matters.[15]

A report by a Joint Select Committee of the House of Lords and House of Commons[16] juxtaposed the idea of complete testamentary freedom against the obligation to provide for one's family, supported by the historic tripartite principle.[17] From the modern perspective it comes as little surprise that the proposed compromise was to provide sufficient funds for subsistence, as opposed to creating a right for a fixed share of the property. Within the evidence presented, however, was the idea that any statute might itself operate in a preventative way, to ensure that testators would not disinherit their family and would comply with public expectations of familial duty,[18] thus recognising that legislation could have both an implicit and an explicit restriction on testamentary freedom.

The provisions of the 1938 Act are worthy of consideration because they focus on the very limited family members that would have benefited under the tri-partite distribution, namely spouse and issue. As first enacted any issue could only claim in so far as they were still dependant, i.e. minor sons or unmarried daughters. Its successor, the Inheritance (Provision for Family and Dependants) Act 1975, has expanded the categories of claimants to include:

- A former spouse who has not re-married[19]
- Any child of the deceased, regardless of age[20]
- A person treated as a child of the family through marriage[21]
- Any person maintained by the deceased immediately before their death[22]
- Cohabitees of two years' standing.[23]

These incremental additions to the categories of claimants over the decades have been in response to changing family structures, the most recent being the amendment of s 1(1)(d) by the Inheritance

[15] (n12) 493
[16] Report by the Joint Select Committee of the House of Lords and the House of Commons on the Wills and Intestacies (Family Maintenance) Bill, together with the Proceedings of the Committee, Minutes of Evidence and Appendices. H.L. Papers, 1930-1931, nos. 97, 127, cited in Dainow (n 5).
[17] Joseph Dainow, 'Limitations on Testamentary Freedom in England' (1940) 25 Cornell L. Rev. 337, 350.
[18] ibid
[19] Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(b). This was amended by the Civil Partnership Act 2004 to include former civil partners.
[20] Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(c)
[21] ibid, s 1(1)(d)
[22] ibid, s 1(1)(e)
[23] Inheritance (Provision for Family and Dependants) Act 1975, s 1(1A), introduced by The Law Reform (Succession) Act 1995

and Trustees' Powers Act 2014 to include those treated as a child of the family even in the absence of marriage or civil partnership between the adults in loco parentis.

However despite many more people being brought into the scope of the legislation as potential claimants the discretionary nature of the act by no means guarantees an award; the questions are whether the deceased's will or intestacy makes 'reasonable financial provision'[24] for a claimant and, if not, what would amount to reasonable financial provision and the answers will always depend on the 'obligations and responsibilities which the deceased had towards [them]'.[25] Thus those towards whom the deceased had financial obligations have strong claims, whilst those whose claim is based on no more than a moral obligation have been less likely to be successful.[26]

The on-going debate about the ability of a testator to exclude an adult child, and the extent to which they should be obliged to provide for them, was illustrated very clearly in the lengthy *Ilott v Mitson*[27] litigation. The Supreme Court's decision in this case re-emphasised how the family provision legislation has always trodden a fine line between testamentary freedom and familial obligations; Lady Hale's judgement commenced with Michael Albrey's comment on the 1938 legislation:

> The protection of the rights of the family as an essential unit in society is a primary concern of most systems of law. Complete freedom of testation, as enjoyed under English law for a brief period of 47 years, is therefore by the standards of contemporary jurisprudence an anomaly.[28]

Yet Lady Hale cited various quantitative and qualitative studies that examined how people felt the estate of a deceased *should* be distributed and contrasted the obligations that we owe to our spouses against those that we owe to independent adult children, using these to explain why the legislation did not give either children or spouses a right to a fixed share, but the more limited discretionary right.[29] Therefore whilst the widening of the categories of potential claimants demonstrates the broader perspective from which the obligations of maintenance are now viewed, the judgement in *Ilott v Mitson* re-affirmed the core principle of testamentary freedom.

Against this background the next (and most substantial) part of this paper will examine the means by which successive governments have used the taxation system to influence our testamentary

[24] Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)
[25] Inheritance (Provision for Family and Dependants) Act 1975, s 3(1)(d)
[26] *Re Jennings (deceased)* [1994] Ch 286, CA
[27] *Ilott v Mitson* [2011] EWCA Civ 346, *Ilott v Mitson* [2015] EWCA (Civ) 797 and *Ilott v Mitson* [2017] UKSC 17
[28] *Ilott v Mitson* [2017] UKSC 17 [50]
[29] ibid, [51-57]

dispositions, and consider the extent to which the taxation laws persuade testators to act in particular ways.

The Inheritance Tax Act 1984 – Legacies to Spouses and Civil Partners

The evolution of estate duties over the centuries is complex, so this paper will only consider the inheritance tax (IHT) principles set out within the Inheritance Tax Act 1984. The payment of 'death duties' have long been a cause for complaint among the middle classes, as the tax rate of 40% on assets in excess of the nil rate band seems high in an era when the top rate of income tax is only 45% (and for much of recent history has been at only 40%). IHT is a growing source of revenue for the Government. In 2015-16 IHT receipts totalled £4.7bn and are expected to hit £5bn in 2017/18.[30] Whilst the percentage of estates that are required to pay IHT is still small it is rising, not least because the nil rate band (NRB) has been capped at £325,000 since April 2009. This leads those who have sufficient assets to be liable to the tax to consider means of tax avoidance during their lifetime, and judicious means of lifetime dispositions and the correct type of investments[31] can significantly reduce the taxation bill.

Some statutory tax avoidance provisions would seem to be designed to encourage a particular type of behaviour. For example the Finance Act 2012 introduced a lower rate of IHT tax of 36% for those who left a portion of their estate to charity.[32] The aim of this was presumably to encourage testators to leave charitable legacies at a time when public finances were under particular pressure and the government wanted to reduce public spending on charities.

In the context of family dispositions, gifts to spouses (and, more recently, civil partners) have long been tax exempt. However the rapid rise in house prices during the 1990s increased the number of estates liable to IHT and this led to a growing realisation that what seemed to be a perk of marriage actually resulted in two individuals only benefiting from a single nil rate band. There was therefore a contradiction within the taxation system. On the one hand the testator was encouraged to leave everything to his / her spouse because this would mean there was no IHT payable. It would also ensure that the survivor would be able to retain all of the family assets, in particular the family home. On the other hand the beneficiaries of the survivor would pay for this privilege in the future, as only a single nil rate band was available to reduce the IHT liability.

[30] http://budgetresponsibility.org.uk/forecasts-in-depth/tax-by-tax-spend-by-spend/inheritance-tax/
[31] For example Business Property Relief, Inheritance Tax Act 1984 s 104
[32] Finance Act 2012, Schedule 33. The proportion to be left to charities is 10%, but the exact calculations are complex because it is calculated by reference to individual components of the estate.

The concerns about this led to increased use of Nil Rate Band Discretionary Trusts (NRBDT). The idea behind these was simple; the first to die would leave a portion of their estate (up to, but not exceeding, the NRB limit) to chargeable beneficiaries such as children. The surviving spouse could be one of the potential beneficiaries but crucially the property did not *belong* to them and so would not form part of their taxable estate on their eventual death.

Whilst the NRBDT was borne out of a desire to prevent the "doubling up" of estates, the effect was to encourage those whose estates would be liable to IHT to make a will leaving a significant portion away from their spouse. Although this was done for tax-saving reasons, it also had a side effect of promoting the children's claim and protecting it in the event of the survivor re-marrying. The tax advice given to married couples therefore directly impacted the type of will they made; many such couples left will trusts they would not otherwise have considered creating in order to reduce their IHT liability.

The taxation benefits of the NRBDT were removed in 2007 with the announcement in the Autumn Statement that the NRB was to be transferable between spouses.[33] The administrative costs of creating and running a NRBDT would now make them both unnecessary and unattractive, so instead of being used as a tax saving tool they became a device purely by which property could be directed towards a group of people (children, grandchildren etc.) in order to protect their inheritance in the event of re-marriage of the widowed spouse. They remain popular for this reason, especially where there are children from more than one relationship and the testator wishes to ensure that a proportion of their estate will pass to their own children.

Although the 2007 alteration was heralded as being a reaction to the fact that many people leave their estate to their spouse or civil partner and was therefore making the taxation system 'fairer'[34] the secondary effect was to re-state the principle that one *should* leave everything to the spouse / civil partner, implying that the spouse / civil partner is the most deserving of the shared wealth that you have generated together. It is interesting to note that this echoes the discussions of the Law Commission in 1971 when they reviewed the family provision legislation, namely that children have less part to play in building up the family assets than spouses[35] and therefore the testator has a greater discretion as to whether to leave property to their children.

[33] 2007 Pre-Budget Report and Comprehensive Spending Review, 5.76. This provision is now set out in the Inheritance Act 1984 s 8A

[34] 2007 Pre-Budget Report and Comprehensive Spending Review, 5.76

[35] Law Commission consultation paper *Family Property Law* (Working Paper No 42) cited by Lady Hale in *Ilott v Mitson* [2017] UKSC 17 [51]

However in larger estates (as those affected by IHT are) there is a difference between leaving everything to the spouse or civil partner and leaving them sufficient to live comfortably. Once step families are brought into the equation it is evident that there are a variety of situations in which leaving everything to the testator's spouse or civil partner may not be the best solution for a number of reasons.

Correlation between IHT and Intestacy

This emphasis on the spouse / civil partner was also reflected in changes to the intestacy provisions at a similar time. The rise in property prices had resulted in a greater number of intestate estates exceeding the previous intestacy statutory legacies to the surviving spouse of £125,000 (spouse and issue) and £200,000 (spouse and other close relatives). In February 2009 the statutory legacy of the spouse or civil partner on intestacy was raised to £250,000 if there were surviving issue and £450,000 when there were other close relatives (parent, siblings, nieces and nephews),[36] a move that ensured that in most cases of intestacy the spouse or civil partner inherited the entire estate. Although this change was justified as a reaction to rising house prices[37] it is argued that the twin effect of the legislative amendments in 2007 and 2009 was to emphasise that the primary heir *should* always be the spouse or civil partner, thereby encouraging such dispositions.

There is, of course, a good reason for this, namely the retention of the family home, and recent reforms of the intestacy provisions have focused on preventing the loss of this property.[38] However there is little evidence that this is a significant problem in intestacy situations; in 2008 it was estimated that there were only an estimated 1,200 cases per year in which the surviving spouse or civil partner was at risk of losing the family home following an intestacy and it was predicted that the increase in the statutory legacy in 2009 would reduce this number substantially.[39] Furthermore in 80% of intestacy cases the family home was jointly owned as beneficial joint tenants with the survivor, removing the need for reliance on either the intestacy provisions or a will to protect the family home.[40]

Therefore the legal ownership of the family home by the surviving spouse or civil partner is rarely an issue, but liability to pay IHT may impact adversely on the survivor's ability to *retain* the family home.

[36] Family Provision (Intestate Succession) Order 2009 (SI 2009/135)
[37] Department for Constitutional Affairs, *Administration of Estates – Review of the Statutory Legacy* (2005), para 50
[38] Ibid, para 20 but compare with Law Commission *Intestacy and Family Provision Claims on Death* (Law Com 191) para 3.14
[39] Law Commission *Intestacy and Family Provision Claims on Death* (Law Com 191) Para 3.23- 3.24
[40] Roger Kerridge, 'Intestacy Reform in 2014' in Birke Häcker and Charles Mitchell (eds), *Current Issues in Succession Law* (Hart 2016), 9

Although IHT payable on real property can be paid in instalments over up to ten years this deferral of payment does attract interest[41] and the obligation to make regular payments would be very difficult to satisfy if the survivor had limited cash assets. Selling the home would often be the only way to meet a substantial IHT liability, which is why the spouse / civil partner IHT exemption emphasises the priority and protection given to the home.

Re-Marriage and Step Families

Whilst the starting point for most people may be a belief that their spouse or civil partner will, or should, inherit everything,[42] this prioritising of the spouse ignores the potential effects on the estate of re-marriage.[43] If the surviving partner re-marries and replicates this "standard" situation of leaving all of their property to their new partner the overall effect will be to disinherit the children from the first marriage. Many people take financial advice on entering into a second marriage (especially if they have assets over which they actively want to keep control) but often the step-parent will inherit the entire estate by virtue of either a will or intestacy[44] and it is argued that the government's stated aim of fairness when changing the taxation system has the potential to lead to perceived unfairness among children of the deceased as they see "family property" passing to the step-family.

Various studies into public perceptions of who should inherit on intestacy demonstrate that there is no strong belief that the spouse should be entitled to all. In contrast, responses to questions of entitlement change according to both the ages of the children and the presence of step-families. In a study by NatCen and Cardiff University the responses to a question as to who should inherit when a man was survived by his second wife and children from his first marriage showed that very few respondents thought that everything should go to the second wife. The majority of respondents instead favoured an estate distribution that ensured that some of his property passed to the children from the first marriage.[45]

[41] Interest is charged on any tax not paid within six months after the end of the month in which the death occurred – Inheritance Tax Act 1984, s 227(1)-(4)
[42] See for example Law Commission *Family Law: Distribution on Intestacy* (Law Com No. 187) paras 28-29 and Law Commission *Intestacy and Family Provision Claims on Death* (Law Com 191) para 3.46
[43] Law Commission *Intestacy and Family Provision Claims on Death* (Law Com 191) para 3.55
[44] See *Sherrington v Sherrington* [2005] EWCA Civ 326 and *Wharton v Bancroft* [2011] EWHC 3250 (Ch) for examples of the disputes that arise from such situations.
[45] A Humphrey, L Mills and G Morrell of the National Centre and G Douglas and H Woodward of Cardiff University, *Inheritance and the family: attitudes to will-making and intestacy* (NatCen, 2010), 48-49.

The contrast between the estate distribution favoured by the IHT legislation and public perceptions is further demonstrated by a recent study by the Institute for Fiscal Studies (IFS).[46] This study focused on the changing expectations around inheriting money; more of the older generation are expecting to be able to leave a sizable inheritance and 75% of those born in the 1970s have either received or 'expect to receive' an inheritance.[47] These expectations rely on the presumption that there is a "natural order" to inheritance, an entitlement that could be destroyed only by health care costs. A recent report by the Resolution Foundation noted that the value of inheritances is set to double by 2035 and concluded that 'most millennials might expect to get a share of a parental home eventually.'[48]

This idea of a natural entitlement to parental property was brought into sharp focus during the 2017 general election campaign when the Conservative party's plans for the funding of social care for the elderly were slammed as a "dementia tax". The focus of the criticisms was not that the person in care would only have £100,000 but rather that this would be the maximum that their children would inherit; the dementia tax was seen as an attack on inheritance rights. The debate about whether family wealth should be used to pay for social care or protected by the government for the benefit of future generations has been discussed elsewhere,[49] and the publicity on this point in the run-up to the 2017 General Election merely revitalised it. However the conclusion of the IFS report, namely that 'inherited wealth is likely to play a more important role in determining the lifetime economic resources of younger generations' underlines why making a will to reduce tax liabilities may create family rifts. The intervention of new familial arrangements is not foreseen by the children or, even if it is, it is presumed that the testamentary dispositions of their parents will still favour them. The juxtaposition of entitlement and disappointment can sow the seeds of litigation.

Recent Amendments to Inheritance Act Rates and Allowances

The summer budget of July 2015 announced a new extension to the NRB for those who wished to leave their 'family home' to 'direct descendants, such as a child or grandchild.'[50] The rationale was that rising house prices would otherwise lead to a doubling of estates liable to IHT to 63,000 by 2020-

[46] Institute for Fiscal Studies *Inheritances and Inequality across and within Generations,* IFS Briefing Note BN192
[47] ibid, part 2
[48] Resolution Foundation Intergenerational Commission Report, *The Million Dollar Be-Question*, December 2017, 13
[49] N Hopkins and E Laurie, 'Social Citizenship, Housing Wealth and the Cost of Social Care: Is the Care Act 2014 "Fair"?' (2015) 78 MLR 112, 113 cited in Brian Sloan, 'Adult Social Care and Property Rights' (2016) Vol 36(2) OJLS 428, 454
[50] Summer Budget 2015, para 1.219

21.[51] Introduced on 6th April 2017, there is now a statutory tax incentive associated with leaving property to direct descendants, which may reverse some, at least, of the above influences.

The detailed provisions were enacted by the Finance Act 2016[52] and are an interesting demonstration of how a government policy that can be explained in a few paragraphs in a budget report can require numerous statutory clauses to encapsulate in full. The crucial limitation is that the property must be the main residence, but there are also provisions to enable those who have down-sized to a smaller property or who have sold their dwelling house since July 2015[53] to gain the benefit of the extended NRB.

Although the budget report suggests that 'direct descendants' will be children and grandchildren, the new statute requires the property to be 'closely inherited'[54] for the tax benefits and the list of those beneficiaries who meet this criterion includes not just lineal descendants but also:

- Spouses / civil partners of those lineal descendants
- Surviving spouses / civil partners of lineal descendants who did not survive the deceased, as long as they have not re-married
- Step-children, who are to be treated as the children of the step-parent
- Adopted children, who can meet the criteria for being lineal descendants of both their natural and adoptive parents
- Foster children, who are treated as the lineal descendants of the foster parent
- Children who have had a guardian or special guardian appointed under s 5 or s 14A of the Children Act 1989 are regarded as the child of their guardian

The breadth of this provision is quite breath-taking, and seems a complete volte-face when compared with the amendments of only a decade previously that encouraged the full estate to be left to the spouse / civil partner. There are some aspects of this list that are worthy of further comment. First of all it does not include siblings, nephews or nieces so is only capable of benefiting those with children (either by birth or step-children, adopted or foster children etc). It is interesting to note that the introduction of inheritance provisions relating solely to real property (or the proceeds thereof) passing to lineal descendants re-creates to an extent a division between real and personal property that had been abolished by the 1925 property legislation.

[51] ibid para 1.218
[52] Schedule 15
[53] Inheritance Act 1984, s 8H
[54] Inheritance Act 1984, s 8D and 8K

Secondly the fact that a legacy to an adopted child would count as property being closely inherited from both their natural and birth parents is an anomaly that contradicts the core principles of the law of adoption.

Thirdly there is no definition of "step-child". One can only presume that the intention is that it be interpreted as per the Children Act 1989[55] such that the step-parent must be married to, or in a civil partnership with, the natural parent to qualify as a step-parent, so excluding those who cohabit from this tax relief. In contrast to the recent amendment to the Inheritance (Provision for Family and Dependants) Act 1975 which includes those treated as a child of the family[56] the taxation system remains focused on benefiting those who have formal relationships with the deceased.

To take advantage of these provisions the deceased's will or intestacy must result in the property being 'inherited',[57] which occurs when the descendant becomes entitled either to the property, or to an interest in possession in the property, on the death of the deceased. This would rule out the creation of a discretionary trust over the property for the potential benefit of both the spouse and children because this would not create the necessary interest in possession. Whilst the impact of this on those who intended to use the NRBDT purely as a tax efficiency tool is simply to require a new will to be drawn up, the effect on those who intended to use trusts to control the destination of their wealth will be greater. There is now a decision to be made between saving tax and creating the will that suits your family circumstances. Every good private client lawyer knows that tax efficiency is secondary to ensuring that the will meets your client's needs, but often clients will be swayed by the potential tax saving, especially when it is a five-figure sum.[58]

The impact of this new IHT exemption comes into sharper relief when the "doubling up" potential between spouses and civil partners (referred to above) is considered. From April 2017 the additional family home NRB can also be transferred, giving a maximum NRB on the death of the second party of £1 million by April 2020.[59] However, this transfer is only possible once,[60] so whilst it makes both taxation and inheritance "sense" to leave everything to the spouse or civil partner from a first marriage, as soon as the survivor enters into a second marriage they are faced with a conundrum. The only way of using the full accumulated NRB is by making a will that ensures that their interest in the

[55] Children Act 1989, s 4A
[56] Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(d)
[57] Inheritance Tax Act 1984, s 8J
[58] Headlines in many of the broadsheets in March 2017 specifically advised people to change their wills to save £70,000 of tax, for example.
[59] Inheritance Act 1984, s 8A and 8D
[60] ibid

family home is closely inherited, by their children or step-children for instance. The additional NRB will be wasted if they leave everything to their new spouse / civil partner, and a discretionary trust in favour of the children and their new spouse or civil partner does not have the tax benefits of an outright gift.

The additional IHT liability of making a less tax-efficient will could be as much as £140,000 (two family home allowances of £175,000 at a tax rate of 40%) and a potential saving of this size is extremely likely to impact the survivor's testamentary dispositions. The author can imagine a situation in which a testator's share of the family home is deliberately left to a step-child (at the expense of a child) because the testator knows that the step-child will be more sympathetic to the needs of their natural parent to remain in the family home.

Whilst the future impact of these provisions is currently unknown, it is clear that the tax benefits of leaving property to direct descendants reverses to some extent the prioritisation of the spouse / civil partner that has taken place over the past decade. The risk is that the testator loses focus on how they *want* to leave their property and focuses instead of how it *ought to be* left; i.e. what the most tax efficient disposal is.

The Situation for Cohabitees

In contrast to the above situation cohabitees do not have any right to their partner's property under the intestacy provisions nor do they have the benefit of the spousal tax exemption or any ability to double up the NRB. Each will lose whatever proportion of their NRB they do not use in full, so in order to take advantage of the new residential NRB they would need to ensure that their share of the family home is closely inherited, in preference to leaving it to their partner. This may mean that testamentary freedom becomes a secondary issue, especially if the family home comprises the bulk of the estate. A survivor with few cash assets or a low income would struggle to meet any tax liability so making the most tax efficient disposal may be the only practical way that the survivor can retain the family home.

The impact of IHT on the survivor's ability to retain the family home was considered in *Burden v UK*[61] in which the Grand Chamber of the European Court of Human Rights noted that a relationship of co-habitation was 'fundamentally different to that of a married or civil partnership couple'[62] and therefore an inheritance tax system that favoured those with the formalised relationship did not violate the European Convention on Human Rights art. 14. The spouse / civil partner IHT exemption

[61] *Burden v UK* [2008] ECHR 13378/05
[62] ibid, para 65

is one of the few remaining tax perks of a formal union; the changes over the last decade emphasised this preferential treatment and the residential NRB further relegates the status of cohabitees behind that of their children.

Influence of the Residential Nil Rate Band on Lifetime Dispositions

For those whose estates will be liable to IHT one key element of lifetime tax planning advice has been to make use of lifetime gifts. Any gift made seven years or more before the death of the testator will be exempt from IHT,[63] and even those more recent gifts attract a £3,000 annual exemption, along with other exemptions for gifts made on marriage for example.[64] Thus by gifting away excess money during their lifetimes the elderly have long been able to limit the IHT payable on their death.

Interestingly the new residential NRB might deter such lifetime gifts. For example, an elderly person with an estate of between £325,000 and £500,000 would formerly have been advised to make judicious use of lifetime gifts, and the potential of a liability for long term residential care could also encourage such gifts.[65] However the residential NRB would mean that this estate would be exempt from April 2020 (or earlier, depending on the value of the estate), as long as the family home is closely inherited. As a result there would be no need for lifetime gifts. One wonders whether the reduced need to give money away whilst alive might also ensure that more of the older generation retain the cash necessary to pay for any long term residential care they may require.

Conclusion and Comments

This paper has shown that whilst forced heirship might be alien to our legal tradition, the influence of taxation law on testamentary dispositions should not be underestimated; solicitors practising since the 1990s who have seen both the growth in use of the NRBDT and its subsequent decline will confirm this. For families with substantial wealth the tax regime is hard to ignore and, of course, it is the wealth within these families that makes post-death litigation most likely. In recent years the increase in the NRB together with changes to intestacy rules has meant that children will often not inherit anything until the death of the second parent. The April 2017 IHT changes may reverse this trend and it remains to be seen whether it will exacerbate or ameliorate familial property disputes. It seems

[63] Inheritance Tax Act 1984, s3A(4)
[64] Inheritance Tax Act 1984, ss19-22
[65] Although it should be noted that the Care Act 2014 has wide-ranging anti-avoidance powers that may defeat the purpose of such gifts – see Brian Sloan, 'Trusts and Anti-Avoidance under the Care Act 2014' (2015) 79 Conv. 489, 496

likely, given the attention it was given in the financial pages in early 2017, that it will lead a number of people to change their wills.

However this paper has shown that the taxation mechanism is increasingly anomalous, prioritising the homes of those in formal relationships to the detriment of cohabitees and those without children. The family home seems an inappropriate central focus for a system of taxation; in 2011 the Law Commission rejected the option of focusing the intestacy laws on the family home on the basis of 'the complexity and potential for unfairness generated by any reform that treats the family home in a different way to other assets in the estate'[66] and the same comment could be applied to the new IHT provisions.

If we wish to emphasise our testamentary freedom then perhaps it is time to overhaul the inheritance tax system so that a variety of lifestyle choices and testamentary dispositions are all taxed the same. This leads us to an interesting question: If we were introducing an inheritance tax system for the first time, what would a "fair" taxation system look like? Would the emphasis be on the family home, and if so, what should be included in the definition of "family"? Or would the emphasis be on tax breaks for legacies to the spouse / civil partner? If protection of the family home is the core requirement, would this be better achieved by way of a charge over the property to be repaid on sale?

The massive leap from zero tax to a 40% band is unusual, even more so since the reform to Stamp Duty Land Tax in 2014.[67] A taxation structure such as this concentrates the mind on how to avoid tax, in contrast to a more graduated scheme which would feel less punitive. The dementia tax debacle re-emphasised the extent to which "tax" is a dirty word, but the purpose of any tax should not be to influence the testator towards certain dispositions. The primary purpose should be compliance with our general obligation to contribute to the country's finances; only once this obligation is complied with does testamentary freedom arise.

[66] Law Commission, *Intestacy and Family Provision Claims on Death,* (Law Com No 331, 2011) para 2.50
[67] Stamp Duty Land Tax Act 2015, s 1