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Public Attitudes to Inheritance in Scotland

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## ABSTRACT

This thesis seeks to provide a deeper understanding of public attitudes to inheritance in contemporary Scottish society, with particular regard to perceptions of parental obligation in an era of increased family diversity. The cornerstone of the thesis is an empirical study conducted in 2014 against the backdrop of the Scottish Law Commission's (SLC) 2009 succession law reform proposals that would seriously curtail children's inheritance rights.

The thesis begins by contextualising the empirical study. It explains the current law of succession as it relates to provision for adult partners and children and examines the SLC's proposed reforms. It argues that the SLC's proposals to further bolster the spouse's position at the expense of the deceased's children are not supported by public opinion. Through analysis of a range of other empirical studies it demonstrates that public opinion supports continued recognition of children in succession law, particularly in reconstituted families.

The second part of the thesis explains how the empirical study was planned and executed before detailing the methodological approach used to analyse the data. Having established the methodological framework, the thesis then discusses the key research findings, focusing primarily on the parent-child relationship. Firstly, it explores the obligations parents are considered to owe their children, addressing how these obligations can be reconciled with conceptions of testamentary freedom. Secondly, it examines whether parental duty is viewed differently when the deceased's surviving spouse is not his children's other parent and, thirdly, it asks what duty, if any, the deceased owes his stepchildren. While the parent-child relationship is the main focus of this thesis, the SLC also proposed reforms to the inheritance entitlements of half-siblings and these proposals are examined in the context of broader discussion on reconstituted families.

The thesis concludes by arguing that, while the SLC rightly identifies social change as a ground for law reform, its proposed reforms fail to adequately reflect social norms in the context of the parent-child relationship. This is because the proposed reforms do not correspond to the societal changes identified: whereas the SLC acknowledges

the rise in the number of reconstituted families, the reforms do not adequately consider how these families can be better served by succession law. Instead, confronted with increased family diversity, the SLC opts for simplicity, privileging the spouse ahead of all others regardless of the effect this will have on children in reconstituted families.

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## Declaration

I hereby declare that I have composed this thesis, that it is my own work and that it has not been submitted for any other degree.

Signed:

A handwritten signature in black ink, consisting of a stylized 'N' followed by a long, sweeping horizontal stroke that curves upwards at the end.

Date:

11/02/18

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## Introduction

### 1 Introduction

The purpose of this thesis is to examine succession law in the context of family obligation and the construction of kinship. Succession law has long acted as a bellwether of societal mores, reflecting shifts in social values and aspirations. Indeed, in his *Principles of the Law of Scotland*, Bell<sup>1</sup> observed that “no department of municipal law is more intimately connected with the state of society than that which relates to the rights of heir, and the rules of descent.”<sup>2</sup> While the absoluteness of such an assertion may today be contested, it is nonetheless true that the rules of succession continue to provide a normative, state-sanctioned view of how a family ought to function, prescribing both the categories of individuals to whom we owe the greatest responsibility and the extent of that responsibility. In this sense, inheritance can be viewed as a process that not only reflects families but also constitutes them.<sup>3</sup> Despite this, succession law has long languished below the horizon of public interest, perpetually overshadowed by laws governing transactions that feature more prominently in our everyday lives. In the minds of many, succession law exists purely as a formula for distributing an individual’s estate and little consideration is given to what the interplay of money, power and relationships—an interplay that it almost inevitably begets—reveals about how we understand families to work.

This widespread indifference to succession law may, however, be set to change as several disparate factors converge to drive inheritance further up the public and political agenda in Scotland. Firstly, while Scots succession law is firmly rooted in ties of consanguinity and affinity,<sup>4</sup> the rise of “blended” families<sup>5</sup> and open

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<sup>1</sup> George Joseph Bell is one of Scotland’s institutional writers. In Scotland “institutional writers” is a term of art and “signifies a small group of writers whose works ... are regarded as formal sources of Scots law” (Fergus, TD and Maher, G, “Sources of Law (General and Historical), Legal Method and Law Reform”, in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Vol 22 (1987) para 534).

<sup>2</sup> Bell, GJ, *Principles of the Law of Scotland* (4th edition, 1839) repr. 2010, Edinburgh Legal Education Trust, Old Studies in Scots Law, vol 1, 3.2.1637.

<sup>3</sup> Finch, J and Mason J, *Passing on: Kinship and Inheritance in England* (Routledge, 2000), 2.

<sup>4</sup> Consanguinity (blood ties) and affinity (marriage-based ties) are the ties traditionally recognised as creating family relationships between individuals (Sutherland, E E, “Child and Family Law”, in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Vol 3 Reissue (2004), para 69).

<sup>5</sup> The term “blended” family has no legal meaning but is commonly used either simply as a synonym for the term stepfamily or to describe a specific category of stepfamilies, those with a common child (see, for example, discussion in Juby, H, Le Bourdais, C and Marcil-Gratton, N, “A Step Further: Parenthood in Blended Families,” 2001 conference presentation available at

cohabitation means the same can no longer be said of contemporary families. Secondly, while governments have long sought to prescribe what happens to a defunct's property, the sharp rise in home ownership in the latter half of the twentieth century means that inheritance is no longer viewed as the preserve of the landed gentry, but instead as a question that concerns the "ordinary citizen."<sup>6</sup> Thirdly, while life expectancy has undoubtedly risen in Scotland,<sup>7</sup> people worldwide are living longer with multiple chronic medical conditions.<sup>8</sup> Thus, at a time when more people are in a position to leave a bequest, they are also being called upon to pay for care during their extended old age.<sup>9</sup> Finally, rising social and economic inequality in Scotland<sup>10</sup> is a growing cause for concern and has led to renewed calls for increases in taxation on wealth transfers<sup>11</sup> made either on death or *inter vivos*.<sup>12</sup> Together these factors have conspired to allow succession law to at least partially shed its reputation as a highly impersonal and unrelatable area of the law.

These factors are not exclusive to the Scottish socio-demographic landscape and, consequently, a number of jurisdictions have undertaken reviews of their succession

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[https://sociology.uwo.ca/research/aging\\_and\\_the\\_life\\_course/family\\_transformation\\_social\\_cohesion/papers/Gratton-PAA\\_Paper.pdf](https://sociology.uwo.ca/research/aging_and_the_life_course/family_transformation_social_cohesion/papers/Gratton-PAA_Paper.pdf) . All websites cited in this thesis were accessed in May or June 2017.

<sup>6</sup> Finch and Mason (2000), 1.

<sup>7</sup> Scottish Government "Health of Scotland's Population – Life Expectancy", available at <http://www.gov.scot/Topics/Statistics/Browse/Health/TrendLifeExpectancy>.

<sup>8</sup> According to the Global Burden of Disease Study 2013, the increase in life expectancy in most country-specific estimates is greater than the increase in Healthy Life Expectancy. ("Global, regional, and national disability-adjusted life years (DALYs) for 306 diseases and injuries and healthy life expectancy (HALE) for 188 countries 1990-2013: quantifying the epidemiological transition," (2015) 386 *The Lancet* 2145). A similar point is made by the Scottish government which states that while boys born in 2014 can be expected to live to 77.4 years on average, only 60.3 of these will be in a "healthy" state (n 7).

<sup>9</sup> This debate on funding social care has been reignited by the Conservative Party Manifesto which advocates all assets above a "capital floor" of £100,000 being made being available to meet care costs for people receiving care both in a care home and care at home (The Conservative and Unionist Party Manifesto 2017, 65, available at <https://s3.eu-west-2.amazonaws.com/manifesto2017/Manifesto2017.pdf> ) Currently, the value of an individual's home is not available to meet care costs for those receiving care at home.

<sup>10</sup> Tracking the rise and fall of income equality, and wider social inequality, is highly complex. Nevertheless, while the various indices are subject to academic debate, it can be agreed that there is at the very least a perception of growing inequality. In terms of *income* inequality the Scottish Government found that, while there has been very little change since 1998/99, the current rate of relative poverty is higher than the 2010/11 level (Scottish Government, *Poverty and Income Inequality in Scotland: 2013/2014*, Executive Summary, available at <http://www.gov.scot/Publications/2015/06/7453>.

<sup>11</sup> For a dispassionate review of this highly-charged subject see Mirrlees J et al, *Tax by Design*, (Oxford University Press, 2011).

<sup>12</sup> While this final point has undoubtedly generated significant interest in succession amongst members of the Scottish public, it is properly a question of tax law and, as such, is beyond the scope of this thesis.

laws, as discussed briefly in Chapter 1. For its part, the Scottish Law Commission (SLC) tabled a Report on Succession in 2009 (the 2009 Report), proposing a number of amendments to the current law.<sup>13</sup> The 2009 Report included a draft Bill designed to implement the recommendations. The Scottish Government did not, however, table the draft Bill wholesale but instead selected certain elements to form the basis of its Succession (Scotland) Bill 2015, which received royal assent on 3 March 2016.<sup>14</sup> By the Scottish Government's own admission, the new Act addresses "mainly technical recommendations relating to jurisdiction and choice of law; wills and survivorship; and rights of succession in limited circumstances."<sup>15</sup> It does not, in other words, address the questions raised by the socio-demographic shifts mentioned in the previous paragraph or the more general issues addressed by this thesis. These remaining—and far more controversial—questions were instead the subject of a second consultation process in 2015.<sup>16</sup> No further legislation has yet been tabled. This thesis will engage with the law reform process and ask whether the direction favoured by the SLC best reflects both public attitudes and wider policy aims.

Although the law reform process considered, among other questions, the rights of spouses and of cohabitants, this thesis will focus on those proposals that relate to inheritance as between parent and child. I chose this focus for two principal reasons. Firstly, the parent-child relationship remains an under-examined area of the law when compared to the spousal relationship and, in particular, when compared to the relationship between cohabitants. Secondly, and more importantly, the parent-child relationship was an obvious choice because it will be the most dramatically affected by the proposed reforms. As will be discussed below, the proposed reforms undermine the status and protection that the law of succession has long afforded the parent-child relationship and, crucially, do so without adequately having considered the impact that reform will have on those living in non-nuclear family arrangements.

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<sup>13</sup> Scottish Law Commission, *Report on Succession* (Scot Law Com No 215, 2009).

<sup>14</sup> Succession (Scotland) Act 2016.

<sup>15</sup> Scottish Parliament, Succession (Scotland) Bill, Stage 1 scrutiny by the Delegated Powers and Law Reform Committee, available at

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/90964.aspx> .

<sup>16</sup> Scottish Government, *Consultation on the Law of Succession* (2015), available at <http://www.gov.scot/Publications/2015/06/7518/downloads>.

While it cannot be said that the SLC proposals have not been subject to consultation or a prolonged period of reflection (the SLC first tried to update succession law in 1990),<sup>17</sup> there has been a lack of meaningful engagement with the most controversial questions. In an attempt to remedy this, I designed and carried out an empirical study into public attitudes towards inheritance, with particular regard to the parent-child relationship. Much of the discussion in this thesis will be anchored in the findings of my research project but, before exploring the core themes, the remainder of this introductory chapter will trace the development of current family protection measures and contextualise them within the existing legislative framework. It will then provide an explanation of the proposed reforms as they affect the parent-child relationship before concluding with an overview of the structure of the remainder of the thesis.

## 2 Legal rights

The Scots law of succession is contained in both common law and statute, with the Succession (Scotland) Act 1964 (the 1964 Act) providing the majority of the current rules of succession relating to intestate succession. The proposed reforms will structurally link testate succession and intestate succession but, as they presently exist as two entirely distinct regimes,<sup>18</sup> they will be considered separately in this Introduction, beginning with testate succession. The reform proposals for testate succession primarily affect the “legal rights” of spouses and children, with radical reform being suggested in relation to the latter group’s rights.

Scots law recognises the principle of testamentary freedom and Scottish testators can generally dispose of their property as they see fit. There is, however, an important exception to this freedom in the form of legal rights. Legal rights are a “species of family protection”<sup>19</sup> that benefit the deceased’s surviving spouse (or civil partner)<sup>20</sup> and children and have been a feature of Scots law “virtually since time immemorial.”<sup>21</sup> Legal rights are enforceable against both testate and intestate estates

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<sup>17</sup> Scottish Law Commission, *Report on Succession* (Scot Law Com No 124, 1990), henceforth the 1990 Report.

<sup>18</sup> With the caveat that, as will be explained forthwith, legal rights apply to both testate and intestate succession.

<sup>19</sup> Meston, M M, “Wills and Succession”, in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Vol 25 (1989) para 772.

<sup>20</sup> Henceforth, unless the context dictates otherwise, “spouse” refers to both spouses and civil partners.

<sup>21</sup> Hiram, H, *The Scots Law of Succession* (2<sup>nd</sup> edition, Tottel Publishing, 2007) at para 3.2.

and do not require any judicial declaration of their existence, although they are not applied automatically.<sup>22</sup> This means that an eligible party must both know of the existence of the entitlement and, in the case of testate succession, be prepared to go against the testator's wishes and make a claim.

Legal rights is a term of art in Scots succession law, and encompasses both the spouse's entitlement (the *jus relictii* or *jus relictiae*)<sup>23</sup> and the children's right (*legitim* or the bairn's part)<sup>24</sup> to a share of the deceased's moveable property. Legal rights arise at common law, although there is some dispute as to whether the children's right and the spouse's right share the same origins, and indeed as to what those origins are. With regard to the theoretical origins, Stair contends that the *jus relictiae* flows from the spouses' co-ownership of the common marital fund<sup>25</sup> (discussed in Chapter 3) while holding the bairn's part to flow "from that natural obligation of parents to provide for their children."<sup>26</sup> In contrast, Erskine argues that *both* the *jus relictiae* and *legitim* flow from the interest the respective parties have in the common marital fund,<sup>27</sup> although he concedes that the children's interest in that fund flows from the law of nature, as opposed to the spouses' interests which stem from their marriage contract:<sup>28</sup>

But it must be attended to, that by the law of nature itself, children have a right, upon their first existence, to some share at least of the goods which formerly belonged in common to their two parents .... Where therefore there is issue of the marriage, the share which, on its dissolution, falls to the children, descends to them in consequence of that natural right, without destroying the notion of a communion of goods.

---

<sup>22</sup> *Ibid* at para 3.25.

<sup>23</sup> The *jus relictii* is the widower's right, while the *jus relictiae* is the widow's right. Both rights afford identical protection although the *jus relictii* did not exist at common law but was introduced by statute in the Married Women's Property Act 1881 s.6.

<sup>24</sup> Although the term *legitim* suggests Roman origins, it is widely considered to flow from an attempt at "a Latinised re-branding" of what was traditionally known as the bairn's part. (Reid, KGC, "Intestate Succession" in Reid, KGC, De Waal, MJ and Zimmermann, R (eds), *Comparative Succession Law, Volume II: Intestate Succession* (Oxford University Press, 2015), 374.

<sup>25</sup> Stair, *Institutions*, 3.8.43.

<sup>26</sup> *Ibid* at 3.8.44.

<sup>27</sup> Erskine, *Institute*, 3.9.15.

<sup>28</sup> *Ibid*.

With regard to jurisdictional parentage, commentators traditionally cited Roman law as the source of legal rights,<sup>29</sup> although such a view is now widely refuted,<sup>30</sup> with commentators instead citing customary law as their probable source.<sup>31</sup> Regardless, there is no doubt that legal rights are “among the most ancient in Scots common law,”<sup>32</sup> being present in the *Regiam Majestatem*, a seminal Scottish legal text dating back to the early fourteenth century.<sup>33</sup> Furthermore, irrespective of whether legal rights are more correctly classified as a “natural obligation” or as an interest in common property, both views continue to pervade contemporary discourse, as will be shown in subsequent chapters.

Despite their importance, the 1964 Act does not define legal rights, stating merely that legal rights are to be interpreted as meaning *jus relictii*, *jus relictiae* and *legitim*,<sup>34</sup> terms which are not themselves explained but which rely on the jurisprudence of the common law.<sup>35</sup> The definition provided by Erskine reads as follows:<sup>36</sup>

If one, upon his death, leave a widow and no children, the goods in communion divide into two equal parts; of which one goes to the widow, and the other is the dead's part... If the deceased has left children, one or more, but no widow, the testament is also bipartite; for the children get one half as *legitim*, the other half is dead's part, which, if it be not actually tested upon, goes also to the children in the character of next of kin. If he leave both widow and children, though all his children should have been of a former marriage, the division is tripartite; the widow takes one-third by herself; another third goes to the children equally among them as *legitim*, and the remaining third is the dead's part.

What is immediately striking about the definition is that it places the spouse and the children on an equal footing: both are recognised as having a legitimate claim on the deceased's estate. Legal rights are of course only exigible against the moveable estate and, depending on the composition of the estate, may be worth very little.

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<sup>29</sup> Gardner, J, “The origin and nature of the legal rights of spouses and children in the Scottish law of succession” (1928) 40 *Juridical Review* 72 at 86.

<sup>30</sup> Reid (2015), 374; Sellar, WDH, “Succession Law in Scotland – A Historical Perspective” in Reid, KGC, de Waal MJ and Zimmermann, R (eds), *Exploring the Law of Succession* (Edinburgh University Press, 2007), 60.

<sup>31</sup> Sellar (2007), 60.

<sup>32</sup> *Ibid*, 59.

<sup>33</sup> Reid (2015), 374.

<sup>34</sup> Succession (Scotland) Act 1964 s.36(1).

<sup>35</sup> Section 131 of the Civil Partnership Act 2004 extends legal rights to civil partners.

<sup>36</sup> Erskine, *Institute*, 3.9.19.

Nevertheless, in the context of testate succession, the law historically recognises the deceased's duty to provide some minimal protection for her children as being of equal importance to her duty to provide some minimal protection for her spouse.<sup>37</sup>

While also exigible in cases of intestate succession, it has been argued that legal rights are not the most effective way of ensuring the protection of children and spouses.

Indeed, Kenneth Reid has argued that legal rights simply provide further entitlement to “two groups of relatives who are already provided for under the Act and who could have been given still more...by an extension of statutory entitlements.”<sup>38</sup>

Nevertheless, despite his misgivings, Reid concedes that retaining legal rights “may be justified as providing protection against disinheritance”<sup>39</sup> in the context of testate succession. The merits of continuing to provide children with a protection against disinheritance, particularly given the changing shape of the modern family, is the question that lies at the heart of this thesis.

### 3 Intestate succession and prior rights

Where the deceased has no will, has not disposed fully of her estate, or where part or all of her will is invalid, the estate is fully or partially intestate. In such cases, the intestacy rules set down in the 1964 Act apply in full.<sup>40</sup> Section 2 of the 1964 Act establishes the succession rights of different classes of person to the intestate state, ranked in order of preference. Succession by one class of heir precludes succession by heirs of a remoter class<sup>41</sup> and Scots law allows unlimited rights of representation.<sup>42</sup> Simply put, representation means that children (or remoter issue) of a predeceasing member of a class can inherit in the place of their predeceased parent (or remoter ancestor).<sup>43</sup>

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<sup>37</sup> Where a choice between the masculine and feminine third person pronoun *reasonably* presents, this chapter uses the feminine pronoun. Chapter 1 will use the masculine pronoun, and subsequent chapters will alternate accordingly.

<sup>38</sup> Reid (2015), 391. While this observation is certainly true, the comment belies the fact that the very high level of prior rights (discussed below) means that the children's statutory entitlement is often worthless.

<sup>39</sup> *Ibid.*

<sup>40</sup> 1964 Act s.1(1)(a).

<sup>41</sup> Reid (2015), 389.

<sup>42</sup> 1964 Act s.5.

<sup>43</sup> For example, if the deceased dies leaving only a sister and the children of a second predeceased sister, the children take the half of the estate that would have fallen to their mother.

The order of succession has remained largely unchanged throughout history, with one significant exception: prior to the 1964 Act, the spouse was not an heir on intestacy.<sup>44</sup> Instead, a spouse was entitled only to the *jus relictæ/relictī* and a second (now obsolete) right known as *terce*, a usufruct<sup>45</sup> of a third of the heritable estate.<sup>46</sup> This could result in considerable hardship for the surviving spouse and, furthermore, was increasingly out of touch with societal values which accorded greater importance to equality between spouses.<sup>47</sup> In recognition of changed societal mores, the 1964 Act took the long overdue step of breaking “the link between blood ties and heirship by making the surviving spouse an heir, entitled to succeed where there are no issue, siblings, or parents, and in preference to the deceased’s uncles and aunts, grandparents or remoter ascendants.”<sup>48</sup> While there can be no question that the failure to recognise the spouse as a key member of the deceased’s family was an anomaly that stood uncorrected for far too long, it must now be asked whether the balance has tilted too far in favour of the spouse at the expense of children, and in particular those children whose parents have re-partnered.<sup>49</sup>

To suggest that the balance may have swung too far may seem an unusual assertion given that section 2 of the 1964 Act states that children inherit ahead of any other class of relative. However, as has often been observed, the list of heirs set out in the Act is misleading.<sup>50</sup> This is because section 1(2) of the 1964 Act stipulates that “nothing in this Part of this Act shall affect legal rights or the prior rights of a surviving spouse [or civil partner].”<sup>51</sup> In other words, any claim on an intestate estate by an heir under section 2 could be defeated either by a spouse’s or child’s claim for legal rights and/or a spouse’s claim for prior rights, with prior rights taking precedence where there are insufficient funds to satisfy both.<sup>52</sup> Whereas legal rights are exigible against the moveable estate only, prior rights are payable from both the heritable and the moveable estate. It has thus been observed that, “in the hierarchy of

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<sup>44</sup> Hiram (2007) at para 4.29.

<sup>45</sup> Scottish legal terminology uses the term “usufruct” to mean *lifereit* (Reid (2015), 372).

<sup>46</sup> *Ibid*, 384.

<sup>47</sup> For a comprehensive review of the reform process that culminated in the 1964 Act see *ibid*, 380-388.

<sup>48</sup> *Ibid*, 389.

<sup>49</sup> This will be discussed in Chapters 5 and 6.

<sup>50</sup> Reid (2015), 390.

<sup>51</sup> Prior rights are the surviving spouse’s statutory entitlements to a share of specific elements of the intestate estate.

<sup>52</sup> 1964 Act s.10(2).

entitlements... prior rights stand right at the very top.”<sup>53</sup> Indeed, they are so extensive that in most cases they will exhaust the entire estate, leaving nothing for the children (or indeed any other relative). It is for this reason that Lord Guest described the effect of prior rights as “the widow scoops the pool”<sup>54</sup>

Before considering the impact of prior rights on children’s inheritance rights, two points bear emphasising. Firstly, prior rights apply *only* to intestate estates and operate entirely independently of legal rights. A spouse may claim both prior rights and legal rights upon intestacy, but only legal rights are available in cases of testate succession. This means that a spouse may be better off were her husband to die intestate than were he to die testate.<sup>55</sup> This is an unremarkable assertion in itself but is key to illustrating that, while the law favours spouses above all others upon intestacy, in a contest between testamentary freedom and spousal protection, testamentary freedom reigns supreme. Secondly, unlike legal rights, prior rights have no origins in the common law but are a creature of statute born of a need to respond to changing social mores. The first statutory protection for spouses was introduced by the Intestate Husband’s Estate (Scotland) Act 1911 which provided widows with a statutory legacy of £500 where no issue survived. Crucially, the 1911 Act also established the hierarchy that remains in force today: the statutory legacy was distributed first, followed by legal rights and then the free estate.<sup>56</sup> The 1964 Act then introduced prior rights proper, establishing the housing right,<sup>57</sup> the right to furniture and plenishings<sup>58</sup> and the monetary right.<sup>59</sup> The maximum value of the three prior rights is revised periodically by the Secretary of State<sup>60</sup> and, until 2005, the increases were generally modest.<sup>61</sup> In 2005, however, the value of the housing element was increased by 250%, and then again in 2011 by a further 150%.<sup>62</sup> The values currently stand at £473,000

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<sup>53</sup> Reid (2015), 392.

<sup>54</sup> HL Debate 12 March 1964, col 580, available at

<http://hansard.millbanksystems.com/lords/1964/mar/12/succession-scotland-bill>

<sup>55</sup> This was highlighted in *Kerr Petitioner* 1968 SLT (Sh Ct) 61 where a widow renounced her legacy of the whole of the husband’s estate to create a situation of artificial intestacy and defeat the claim to *legitim* of a child from a previous marriage.

<sup>56</sup> *Ibid.*

<sup>57</sup> 1964 Act s.8.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, s.9.

<sup>60</sup> *Ibid.*, ss. 8 and 9.

<sup>61</sup> Reid, D and Sweeney, N, “Land reform, inheritance rights and unintended consequences” (2015) 27 *Child and Family Law Quarterly* 403 at 406.

<sup>62</sup> *Ibid.*

(housing right),<sup>63</sup> £29,000 (furniture right) and £50,000 (monetary right),<sup>64</sup> the latter depending on whether issue also survive the intestate.

The result of having fixed the maximum values of prior rights at such high levels is that Scottish children are likely to inherit “little or nothing” from a married parent who is intestate.<sup>65</sup> In those cases where the surviving spouse is also the children’s other parent this is largely uncontroversial since research consistently shows that children have no expectation of inheriting where the second parent is still alive.<sup>66</sup> The same cannot, however, be said when the deceased has remarried. In such instances concern is regularly expressed that the second spouse cannot be relied upon to subsequently provide for the intestate’s children.<sup>67</sup> Given that divorce and remarriage are more likely than they were at the time the 1964 Act was introduced,<sup>68</sup> the increase in the value of prior rights has particular consequences. Today, in many instances the competition for the deceased’s estate is not simply competition between a surviving spouse and the children, but “between a first family (represented by issue) and a second family (represented by the surviving spouse).”<sup>69</sup>

Concern expressed by commentators about the total exclusion of children<sup>70</sup> should not be interpreted as a call to place children and spouses on an equal footing. As will be acknowledged in Chapters 5 and 6, there are, in many cases, good reasons for providing the spouse with the majority of the estate. Certainly, the stated policy objective of allowing the spouse to remain in the couple’s home is sound<sup>71</sup> and,

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<sup>63</sup> Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (SSI 2011/436).

<sup>64</sup> Where there are no issue, the surviving spouse receives £89,000.

<sup>65</sup> Reid and Sweeney (2015) at 406.

<sup>66</sup> See Finch and Mason (2000), 72.

<sup>67</sup> See discussion in Douglas, G, Woodward, H, Humphrey, A, Mills, L, and Morrell, G, “Enduring love? Attitudes to family and inheritance law in England and Wales” (2011) 38 *Journal of Law and Society* 245 at 259. For further discussion see p77 and Chapter 5 generally.

<sup>68</sup> Rowlingson, K and McKay, S, *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), 43.

<sup>69</sup> Norrie, K McK, “Reforming succession law: intestate succession” (2008) 12 *Edinburgh Law Review* 77 at 80.

<sup>70</sup> See Reid, D, “From the cradle to the grave: politics, families and inheritance law” (2008) 12 *Edinburgh Law Review* 391.

<sup>71</sup> Although an argument can also be made that the policy aim ought more specifically to be to ensure that the surviving spouse is comfortable rather than specifying that the intestate succession provision must be able to cover the value of the current family home (See Reid and Sweeney (2015) at 412). Nevertheless, the point remains that it would be poor public policy to have spouses rendered homeless by succession law (although no studies appear to have been carried out as to how many spouses face losing their homes when their spouse dies intestate).

unsurprisingly, enjoys widespread public support.<sup>72</sup> However, one of the features of society that has changed since the introduction of the 1964 Act is “the modern tendency for everything—house, contents, even money in the bank—to be owned together.”<sup>73</sup> In the context of intestate succession, this means that “whereas a widow in 1964 might have had to use her prior rights to claim 100 per cent of the house and contents, her modern counterpart will probably need to inherit only a half share.”<sup>74</sup> In this context, the incessant drive to increase the value of prior rights seems somewhat surprising.

It is an anomaly that can in part be explained by asking who the Scottish law reformers perceive to be the primary beneficiaries of prior rights. There can be no doubt that women were the primary beneficiaries of the 1964 reforms: in previous generations gender and pay inequity were such that many women were financially dependent on their husbands,<sup>75</sup> a reality that risked unleashing devastating consequences when a husband died intestate and the estate passed to a relative of the husband rather than the widow. Without minimising the gender inequality that still exists in Scotland today,<sup>76</sup> it is not clear that the situation is the same as it was in 1964. Most couples today own their house together and so the full value of the prior right will rarely be used in meeting the policy objective of allowing the spouse to remain in the home. Furthermore, it is equally unclear that the poverty many women experience today would be alleviated by attaching a higher value to the housing

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<sup>72</sup> See, for example, Humphrey, A, Mills, L, Morrell, G, Douglas, G and Woodward, H, *Inheritance and the family: attitudes to will-making and intestacy* (National Centre for Social Research, 2010), 66.

<sup>73</sup> In support of this assertion, Reid points out that, pursuant to s. 25 of the Family Law (Scotland) Act 1985, there is a presumption that “household goods” are owned equally by parties to the marriage (Reid (2015), 394). Furthermore, based on information provided by the Registers of Scotland, the SLC asserted that 42% of houses are owned in common by spouses or civil partners while 14.5% are held in common by parties not stated to be married and with different surnames, some of whom may of course be married or cohabiting (2009 Report, at para 2.10).

<sup>74</sup> Reid (2015), 394.

<sup>75</sup> While many historians argue that notions of economic dependence are overstated, as working class women in particular have long been involved in waged labour (see for example Gordon, E and Nair, G, “The economic role of middle-class women in Victorian Glasgow” (2000) 9 *Women’s History Review* 791 at 791), it is also true that women’s labour market participation has increased over the past 50 years. In the early 1960s, 45% of women in Scotland were in paid employment compared to 72.4% in 2014 (Sawers, L, “The role and contribution of women in the Scottish economy” (2015) at para 4.1, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/417361/The\\_role\\_and\\_contribution\\_of\\_women\\_in\\_the\\_Scottish\\_economy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417361/The_role_and_contribution_of_women_in_the_Scottish_economy.pdf)).

<sup>76</sup> Women are still more likely than men to be in low-paid and part-time jobs (Aiton, A, *The Gender Pay Gap – Facts and Figures 2016*, (Scottish Parliament, 2017), available at [http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB\\_17-06\\_The\\_gender\\_pay\\_gap\\_fact\\_and\\_figures\\_2016.pdf](http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_17-06_The_gender_pay_gap_fact_and_figures_2016.pdf)).

right.<sup>77</sup> Yet, despite this—and although the proposals are gender neutral—the rhetoric in the 2009 Report almost always appears to envisage a widow.<sup>78</sup> This is unfortunate as any call for a reduction in the spouse’s share risks being perceived as reactionary and antithetical to women’s interests.

Not only does this tendency divert the focus of the debate, it is also misleading. While the reform proposals are indirectly framed as benefiting vulnerable women from a life of penury, they in fact appear to have been written with the wealthiest sectors of society in mind. Although the SLC stated in 1990 that it was more important for the rules on intestate succession to be “suitable for small and medium sized estates than...very large estates,”<sup>79</sup> its current proposals (and the current law) appear to depart from this objective. Placing the housing value of prior rights at £473,000 when the average confirmed estate was £196,343 in 2013-2014<sup>80</sup> suggests that the law reformers envisage not only a widow, but a wealthy widow, as only the wealthiest surviving spouses require the protection afforded by such a high entitlement. Indeed, even at the 2005 level of £300,000 for the housing right, only 2% of intestate estates would have devolved on the children, or indeed anyone other than the surviving spouse.<sup>81</sup> Thus, contrary to the SLC’s intention to provide rules suitable for the “average” family, today’s rules are most suitable for the wealthiest in society, as it is

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<sup>77</sup> Rowlingson and McKay have demonstrated that there is a correlation between receipt of inheritance and socio-economic and ethnic characteristics, with white owner-occupiers in professional classes being much more likely to receive something than other groups (Rowlingson and McKay (2005), 28). Furthermore, the increasing trend of “assortative mating”, whereby individuals choose their spouse in groups of similar earnings or educational levels, might suggest that those in greatest financial difficulty would be unlikely to be married to somebody who was the sole owner of a very expensive house. Chen et al. found that assortative mating increased in nearly all OECD countries from the mid -1980s to the mid-2000s. Of the 23 countries studied, the trend was most striking in Luxembourg, followed by the UK and the Netherlands (Chen, WH, Förster, M and Llena-Nozal, A, “Demographic or labour market trends: what determines the distribution of household earnings in OECD countries?” (2014) 1 *OECD Journal: Economic Studies*, Vol. 2013/1, available at <https://www.oecd.org/eco/growth/demographic-or-labour-market-trends-what-determines--the-distribution-of-household-earnings-in-OECD-countries.pdf>).

<sup>78</sup> Reid and Sweeney (2015) at 406. Professor Gretton, a former Law Commissioner, also expressed his concern about this in my interview with him, observing that the SLC’s decision to primarily use “female pronouns” when referring to the surviving spouse suggested a “hint of dependency” in the spousal relationship that did not necessarily reflect contemporary social reality. Professor Gretton was one of the interviewees in the empirical project (see p65 for further discussion).

<sup>79</sup> 1990 Report at para 2.1.

<sup>80</sup> Reid and Sweeney (2015) at 411. Furthermore, as the available statistics include only confirmed estates and do not reflect those estates that are too small to require confirmation, the true average is probably less than £100,000.

<sup>81</sup> Reid (2008) at 414.

only in very wealthy families that both the children and the spouse can inherit on intestacy. This situation will be exacerbated under the proposed reforms.

#### 4 The reform process

Succession law will, at some point, affect us all and there is therefore merit in ensuring that the provisions relating to how a deceased's estate is distributed are broadly acceptable to the general population. Of course, as succession law is “not the kind of question which leads to popular agitation,”<sup>82</sup> any change tends to be reactive rather than proactive. Certainly, by the time the review that resulted in the 1964 Act was launched, the then current regime was held to be “utterly out of touch with reality.”<sup>83</sup> While the gap between the current regime and societal expectation may not be as egregious as it was prior to 1964, the SLC is right to state that a review of the legislation is necessary given the “significant changes in Scottish society and in the way in which people live”<sup>84</sup> over the past fifty years.

In the introductory comments to its 2009 Report, the SLC made it abundantly clear that, while a desire to simplify what has long been seen as complex and unwieldy legislation motivated some of the proposed changes, social change was the primary driver behind the reform process:<sup>85</sup>

Since our last examination of succession, there have been significant changes in Scottish society and in the way in which people live....However, in our view the law has not kept pace with all the changes which are occurring. For instance, many more people are cohabiting, either in same-sex relationships or opposite-sex relationships. Step-families are becoming more common. People are living much longer so that many children are middle-aged or older when their parents die, leading to difficult questions about the protection to be afforded to children who are adults at the time of the parent's death. And wealth is more widely distributed, particularly through increased ownership of heritable property.

With the exception of the assertion on wealth distribution,<sup>86</sup> the SLC's observations are unremarkable and the subject of general consensus. However, as will be addressed

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<sup>82</sup> Anon cited in Reid (2015), 387.

<sup>83</sup> Lord Cooper of Culross, *Selected Papers 1922-54 (1957)* 150.

<sup>84</sup> 2009 Report at para 1.3.

<sup>85</sup> *Ibid.*

<sup>86</sup> Statistics on wealth distribution are complex, and in flux. Appleyard and Rowlingson argue that while widening home-ownership and rising house prices may have helped slow the growth in wealth inequality, those at the bottom are being left further behind and there is an increasing divide between

throughout this thesis, the degree to which the proposed reforms respond to the highlighted changes is less than clear. For example, while the rise of stepfamilies is cited as an example of change, the 2009 Report pays scant attention to this shift. Equally surprising, while no fundamental shift in the nature of the parent-child relationship is cited as a reason for reform, some of the most important changes advocated by the Report serve to minimise the importance accorded to that relationship.<sup>87</sup>

The 2009 Report focused its reform proposals on two main areas: the distribution of intestate estates and the protection of close relatives from disinheritance by the deceased.<sup>88</sup> Although these are presented as two entirely separate matters they are, as will be explained, intrinsically linked. With regard to intestate estates, three main changes are proposed. Firstly, spouses are to be moved ahead of parents and siblings in the order of succession;<sup>89</sup> secondly, legal rights are to be removed or curtailed;<sup>90</sup> and, thirdly prior rights are to be consigned to history, replaced with a “threshold sum” payable to the spouse which will take priority over all other claims. The “threshold sum” model means that the spouse will be entitled to the whole of the estate, where it is worth less than the specified amount. While the SLC was persuaded<sup>91</sup> that the amount of the threshold sum is a matter for the Scottish Parliament to decide,<sup>92</sup> it seems equally clear that this amount will not be low. In its recent consultation, the Scottish Government sought views on values for the threshold sum ranging from £335,000 to £650,000.<sup>93</sup> Furthermore, whereas under the current

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the “housing haves” and the housing “have-nots” (Appleyard, L and Rowlingson K, *Home-Ownership and the Distribution of Personal Wealth: A Review of the Evidence*, (Joseph Rowntree Foundation, 2010), 20.

<sup>87</sup> It should also be noted that, while perhaps not a factor that motivated the SLC, the land reform movement has played a significant role in driving forward succession law reform. For full discussion see Reid and Sweeney (2015).

<sup>88</sup> 2009 Report at para 1.2.

<sup>89</sup> *Ibid* at para 2.16.

<sup>90</sup> The proposed changes to legal rights affect both testate and intestate succession and will be explained below.

<sup>91</sup> The SLC acknowledged that, in reaching this decision, it was persuaded by the arguments of the “many” respondents who argued that abolishing a fixed share for children was a question of social policy (2009 Report at 3.35). Reid, for example, argued that the “debate should not be confined to the legal profession but...ought to take place in the public arena (Reid (2008) at 417).

<sup>92</sup> *Ibid* at para 2.14.

<sup>93</sup> Scottish Government (2015) at 2.26. It is worth noting that the housing right in the current regime can only be claimed on the net value of a house where the surviving spouse was ordinarily resident and it is rarely claimed in full; by contrast the threshold sum would essentially operate as a blank cheque for the full amount. For full discussion see Sweeney and Reid (2015) at 406-409.

system the children inherit the free estate after payment of prior rights and legal rights, the SLC proposals suggest that any remainder following payment of the threshold sum be split equally between the spouse and children.<sup>94</sup> It is not clear which of the social “developments” that underpin the reform process militate in favour of such change.

The second area of reform identified by the SLC is testate succession and, more specifically, protection against disinheritance. As outlined above, Scotland is unusual amongst English speaking countries in offering children a degree of protection as an automatic entitlement. In England and Wales, for example, no such protection exists and children must make a claim based on the deceased not having made “reasonable financial provision”<sup>95</sup> for them.<sup>96</sup> It is clear that the SLC has long favoured ending legal protection for non-dependent children,<sup>97</sup> although it has equally long acknowledged that this will be a highly controversial move, describing it as “one of the most fundamental and difficult questions in this whole review of succession law.”<sup>98</sup> Given the sensitivity of the topic, and the lack of consensus among SLC consultees, the Commissioners held that the question was for Parliament to decide<sup>99</sup> and submitted two options for consideration in its Report.

The first option is presented as a “fixed legal share” for all children.<sup>100</sup> While this suggests that children will receive a clear, fixed percentage the descriptor is, on closer examination, somewhat deceptive. Children, it is explained, will not receive a fixed share of the estate, but a fixed share of what they would have received had the parent died intestate. By linking the testate regime to the intestate regime—which will operate on the entire estate and will no longer distinguish between heritable and moveable property—the reforms mean that children may *potentially* receive more than under the existing system, where their claim is limited to the moveable estate.

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<sup>94</sup> 2009 Report at para 2.16.

<sup>95</sup> Inheritance (Provision for Family and Dependents) Act 1975 s.1(1).

<sup>96</sup> The question of reasonable financial provision for adult children attracted a not inconsiderable degree of attention following the Court of Appeal ruling in *Ilott v Mitson* [2015] EWCA Civ 797 and its subsequent reversal by the Supreme Court (*Ilott v Blue Cross and others* [2017] UKSC 17). For further discussion see Chapter 1, 1.2.1.

<sup>97</sup> Scottish Law Commission, Discussion Paper on Succession (Discussion Paper No 136, 2007) at para 3.96.

<sup>98</sup> 1990 Report at para 3.9.

<sup>99</sup> 2009 Report at para 3.35.

<sup>100</sup> *Ibid* at para 3.36.

However, as discussed above, in the vast majority of cases, children will receive nothing on intestacy and so, the fixed legal share will, in most cases, entitle children to a fixed share of nothing.

The second option, the option the SLC appeared to favour in both its Reports, proposes a right for a dependent child to receive a capital sum payment from the deceased's estate. Again this is less generous than it first appears, as any estate passing to a person who owes the child an obligation of aliment would be exempt. Given that in many cases the surviving spouse (assuming the surviving spouse is the main beneficiary) will owe the child an obligation of aliment, claims by dependent children are likely to be rare.<sup>101</sup>

What is striking about this proposal is that it shifts the criterion used to determine children's eligibility from status to need. While many Scottish commentators argue that to do so would be to "deny children legal recognition as family members,"<sup>102</sup> some commentators from other jurisdictions, and the SLC, have made the case for a needs-based approach. For example, in rehearsing arguments in favour of abolishing a fixed legal share for children, the SLC noted that children tend to be middle aged when their parents die and "therefore do not require substantial assets to set them up in life."<sup>103</sup> Similarly, in the context of family provision claims, Conway argues that a distinction can be drawn between "infants and minors where there is a clear element of financial dependency which transcends the death of a parent...[and]... independent adult children who are (or should be) capable of providing for themselves and were not financially reliant on their parent before the latter's death."<sup>104</sup>

However, as will be discussed throughout this thesis, while inheritance can clearly deliver a significant financial windfall to adult children, financial gain is often secondary to the symbolic importance of an inheritance as a reaffirmation of the parent-child relationship. Furthermore, as is also discussed later in this thesis, there is

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<sup>101</sup> *Ibid* at para 3.72.

<sup>102</sup> Hiram, H, "Reforming succession law: legal rights," (2008) 12 *Edinburgh Law Review* 84 at 85.

<sup>103</sup> 2009 Report at para 3.30.

<sup>104</sup> Conway, H, "Do parents always know best? Posthumous provision and adult children" in Barr, W (ed), *Modern Studies in Property Law, Volume 8* (2015), 132.

nothing to suggest that Scottish parents are perturbed by the limitation on their testamentary freedom that legal rights impose. Of course, decisions as to which relationships are worthy of state protection rest on factors other than public opinion or the expressive function of a statute, and wider public policy considerations must also be taken into consideration.

In some instances, these policy considerations are both obvious and compelling: although beyond the scope of this thesis, it would not be unreasonable to argue that, despite public preference, consideration should be given to the potential impact of inheritance tax on social equity and wealth redistribution. Similarly, while many people would prefer an estate to devolve to anyone other than the Crown,<sup>105</sup> there are clear public policy reasons for imposing a cut off in intestacy statutes, not least given that tracing relatives is often costly and time consuming.<sup>106</sup> In contrast, the public policy reasons for limiting the availability of legal shares to dependent children are not evident. This is because the share of the testate estate that would have devolved to the adult child would not instead be used to advance the public interest, rather it would simply be available to the testator to dispose of as he saw fit.<sup>107</sup>

At best, by excluding adult children, it could be argued that the state is expressing the view that adult children should be independent, but this rather ungenerous view also risks communicating that those who are in financially straitened circumstances only have themselves to blame. Furthermore, a shift to a needs-based system would entirely disregard the emotional aspect of the parent-child relationship and reduce a life-long relationship to one that ends, generally speaking, at the age of majority. In the absence of a compelling public policy ground to justify change, there is little

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<sup>105</sup> The SLC has noted example, has noted the “widespread reluctance” to see anything forfeited to the State while the Law Commission of England and Wales noted the public generally preferred distant family members over the State (Scottish Law Commission Intestate Succession and Legal Rights (Consultative Memorandum No. 69) September 1986 at 3.58 and Scottish Law Commission Report on Succession (Scot Law Com No 124) 1990, para 2.28 and Law Commission ‘Intestacy and Family Provision Claims on Death’ (Law Com No 331) 2011, para 3.30 respectively).

<sup>106</sup> Claims of distant relatives depend on the bloodline but, as will be shown, beyond the claims of children (and perhaps grandchildren), the blood tie is today largely irrelevant in perceptions of entitlement; instead, it is the quality of the relationship between the deceased and the beneficiary that counts.

<sup>107</sup> Although in cases such as *Ilott v Mitson and others* [2015] EWCA CIV 797, a charity stood to benefit, charitable giving is not common. Further, charitable giving will not always benefit the public interest and indeed, some argue that certain charitable organizations such as private schools undermine the public interest.

reason to introduce such radical change and displace public preference by excluding adult children.

## 5 Proposed structure

Struck both by the apparent hostility the SLC displayed towards adult children, and by the seeming disconnect between the proposed reforms and the changing nature of modern families, I developed the research project to explore the parent-child relationship further. The project was anchored in the two main areas of reform identified by the SLC: the distribution of intestate estates and the proposed changes to legal rights, with a specific focus on the parent-child relationship. In particular, it focused on attitudes towards parental responsibility and obligation in the context of remarriage and stepfamilies.

In order to place the project in a wider international context, Chapter 1 provides an overview of recent succession law reform processes undertaken in England, Canada and Australia and highlights the main findings of the principal empirical studies carried out in recent years in the UK and, in one instance, Australia. Chapter 2 then describes the methodological approach adopted for the study, explaining why a qualitative study was chosen over a quantitative study and setting out the framework that was employed for analysing the data.

Exploration of the parent-child relationship begins in Chapter 3 with an overview of the historical origins of the law of parent and child, and analysis of the research findings then begins in Chapter 4. Chapters 4 to 7 analyse perceptions of obligation and expectation in the parent-child relationship, focusing on different “types” of family unit. Chapter 4 considers intact families,<sup>108</sup> while Chapters 5 to 7 consider complex families. Specifically, Chapter 5 addresses the first family/second family

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<sup>108</sup> An “intact family” is a term used in Canadian literature to refer to families comprising a couple, with children, whose children were all born or adopted during the current union (<http://www.statcan.gc.ca/pub/89-650-x/89-650-x2012002-eng.htm>). While acknowledging the inherently political nature of language, the term is used here as a neutral, convenient handle, and implies no judgement.

dynamic<sup>109</sup> while Chapters 6 and 7 consider stepfamilies. As part of the examination of stepfamily relationships, Chapters 6 and 7 also consider the entitlement of half-siblings, another important relationship in the anatomy of the modern family. Conscious that the SLC privileged a “simplifying instinct”<sup>110</sup> throughout its Report, consideration is also given to more nuanced options that have been considered in other jurisdictions to see if they could inform the Scottish debate.

The thesis will conclude that the proposed reforms do not adequately reflect contemporary understandings of parental obligation and that a more nuanced approach is required, particularly with regard to complex families.

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<sup>109</sup> This term is used to describe families where one (or both) of the parents have formed a second, or subsequent, relationship. This definition of the first family/second family dynamic is based on the definition used in Norrie (2008) 77 at 80 and cited in the 2009 Report at para 2.29. In Norrie’s definition, the second family is said to be represented by the second (or subsequent) spouse, presumably as only spouses automatically benefit on intestacy. However, in this study, no distinction is made between second (or subsequent) spouses or second (or subsequent) cohabitants.

<sup>110</sup> Norrie (2008) at 78-79.

## Chapter 1: An overview of legislative reform and empirical studies in other jurisdictions

### 1.1 Introduction

As was explained in the Introduction, an empirical research project lies at the heart of this thesis. Consequently, before undertaking it, I conducted a literature review of other significant empirical studies on inheritance in order to ascertain what information was available and where gaps in knowledge persisted. Unfortunately, only a very limited number of Scottish studies were available for consultation. The Scottish Consumer Council (SCC) undertook a quantitative study in 2006 to measure the public's *understanding* of succession law;<sup>111</sup> it did not, however, measure attitudes towards, or expectations of, succession law. For its part, the SLC has commissioned two studies. In 1986, as part of the reform process that led to the publication of the 1990 Report, a quantitative opinion survey was carried out.<sup>112</sup> While the SLC relied on some of the findings of the 1986 survey in its 2009 Report, it also commissioned a second survey in 2005 to inform the current reform process.<sup>113</sup>

All three Scottish surveys have been quantitative and, as discussed below,<sup>114</sup> provided only incomplete attitudinal information: the SCC study did not set out to address public attitudes while the two SLC studies suffered from some serious shortcomings. As a result, attention was turned to studies conducted in other jurisdictions. In contrast to the dearth of available studies in Scotland, three key empirical studies have been conducted on inheritance in England and Wales,<sup>115</sup> one of which included Scottish participants.<sup>116</sup> The three studies contained qualitative components and engaged in detail with many of the issues flowing from the SLC's proposed reforms. All three were invaluable both in helping me design my own study and in contextualising my findings.

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<sup>111</sup> O'Neill, S, *Wills and Awareness of Inheritance Rights in Scotland* (Scottish Consumer Council, 2006), available at <http://webarchive.nationalarchives.gov.uk/20090724135150/http://scotcons.demonweb.co.uk/publications/reports/reports06/rp10wrep.pdf>.

<sup>112</sup> Scottish Law Commission, *Consultative Memorandum on Intestate Succession and Legal Rights* (CM No. 69, 1986), Appendix II (henceforth the 1986 Survey).

<sup>113</sup> Scottish Executive, *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey* (Scottish Executive Social Research, 2005), (henceforth the 2005 Survey).

<sup>114</sup> See 1.3.2 and 1.3.3

<sup>115</sup> Finch and Mason (2000); Humphrey et al. (2010); and Rowlingson and McKay (2005).

<sup>116</sup> Rowlingson and McKay (2005).

As part of their exploration of family obligation, all three studies also gave at least some consideration to competition between the state and the family with regard to elder care costs, an area I intended to address. In the course of my preliminary research, I also discovered a large Australian study on attitudes to financial assets and intergenerational transfers: the comprehensive nature of the study, the apparent cultural similarities between Scotland and Australia, and the recency of the data led me to include it in my literature review.

Finally, in recent years, a number of other jurisdictions have also undertaken succession law reform processes. Consideration was given to some of these in order to determine whether lessons could be learned from the way in which other jurisdictions approach complex family dynamics in succession law.<sup>117</sup> Shared legal history, recent legislative activity and ostensibly similar cultural norms<sup>118</sup> made England, Canada and Australia obvious choices, without diminishing the value of lessons that could be learned from other jurisdictions were a more comprehensive future study to be undertaken.

The purpose of this short chapter is therefore two-fold: firstly, it will give a very brief overview of some recent reform processes in England, Canada and Australia; and, secondly, it will highlight the main findings of the principal empirical studies carried out in recent years in the UK and, in one instance, in Australia. In each section, I will briefly explain the relevance of the selected reform proposals, or highlighted elements of the empirical study, to my own study. This will allow the findings of my own empirical project to be contextualised against a broader backdrop of evidence.

## **1.2 International reform processes**

### **1.2.1 England and Wales**

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<sup>117</sup> It goes without saying that legal traditions vary between jurisdictions, however lessons can still be learned with regard to the ways in which other jurisdictions approach universal questions relating to the human experience (love, family, obligation).

<sup>118</sup> Relevant cultural norms might include a shared commitment to gender equality, a recognition of non-economic contributions to the accumulation of household wealth and a view of property as a source of retirement income, in part due to the recent boom in housing wealth.

Succession law reform was included in the Tenth Programme of Law Reform of the Law Commission for England and Wales (the Law Commission), at the request of both the Ministry of Justice and other stakeholders.<sup>119</sup> The Law Commission began work on a review of the law relating to intestacy and family provision in 2008 and, in 2011, published a report with recommendations and draft legislation (the 2011 Report).<sup>120</sup> The majority of the Commission's recommendations were accepted and incorporated into the Inheritance and Trustees' Powers Act 2014.<sup>121</sup>

Many of the English reforms are beyond the scope of this thesis but significant overlap nonetheless exists between the questions examined in England and those addressed in Scotland. Most obviously, the spouse's entitlement emerged as the "principal focus" of the debate in England and Wales,<sup>122</sup> as it has in Scotland. This was unsurprising as it had been a long-standing and controversial area of reform. In 1989 the Law Commission published a report making two major recommendations, one of which was that the surviving spouse of an intestate should receive the entire estate.<sup>123</sup> However, in much the same way as the SLC's 1990 recommendations on spouses were not enacted, the Law Commission's 1989 recommendation on surviving spouses equally failed to pass legislative muster. The Law Commission was clear that this was due to concern that children of the deceased, "particularly those from a relationship other than the marriage to the surviving spouse" would be prejudiced.<sup>124</sup> Consequently, the Law Commission identified complex families as a key area for examination in its 2011 Report.<sup>125</sup>

As part of the reform process the Law Commission sought to investigate public attitudes towards intestacy and family provision. Cognisant of the lack of "up-to-date,

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<sup>119</sup> The Law Commission, *Intestacy and Family Provision Claims on Death* (Consultation Paper No 191, 2008) at para 1.11, henceforth Consultation Paper 191.

<sup>120</sup> The Law Commission, *Intestacy and Family Provision Claims on Death* (Law Com No 331, 2011) at para 1.6.

<sup>121</sup> The government accepted the Law Commission's recommendations except those relating to cohabitants, see Kerridge, R, "Intestate Succession in England and Wales" in Reid, KGC, De Waal, MJ and Zimmermann, R. (eds), *Comparative Succession Law, Volume II: Intestate Succession* (Oxford University Press, 2015), 340.

<sup>122</sup> *Ibid.*, 337.

<sup>123</sup> The Law Commission, *Family Law Distribution on Intestacy* (Law Com No. 187, 1989) discussed in 2011 Report at para 1.7.

<sup>124</sup> 2011 Report at para 1.8.

<sup>125</sup> *Ibid.*

statistically significant” evidence,<sup>126</sup> the Law Commission asked the National Centre for Social Research (NatCen) to carry out a large-scale public opinion research project.<sup>127</sup> The project was conducted under the leadership of Professor Gillian Douglas (Cardiff University) and Alun Humphrey of NatCen.<sup>128</sup> The Commission “attached great importance” to the empirical data although did not “invariably” regard it as “determinative of policy.”<sup>129</sup> This is entirely understandable, as the intricacies of succession legislation cannot simply be decided by opinion poll. However, the resulting legislation has been met with some criticism as, rather than addressing concerns raised in the NatCen study (and several other studies), it has arguably moved England’s legal position even further out of step with public opinion than was originally the case.<sup>130</sup>

Prior to the reform, English law provided that, in cases of intestacy where the deceased left issue, the spouse was entitled to a statutory legacy of £250,000 and a life interest in half of the remainder of the estate.<sup>131</sup> Under the 2014 provisions, however, the spouse takes half of the balance absolutely, rather than for life.<sup>132</sup> Although such a move may have little practical consequence—as in most cases of intestacy since the 1925 reforms a surviving spouse has inherited the whole estate<sup>133</sup>—this small change nonetheless moves the English legislative framework even closer to a “spouse takes all” model. It is a surprising shift given that one of the clearest messages to emerge from the NatCen study was that provision should be made for the deceased’s children, particularly where the surviving spouse is not their other parent.<sup>134</sup> Beyond the Law Commission’s commitment to simplicity,<sup>135</sup> little explanation is given as to why no attempt was made to find a more satisfactory solution to a question that has plagued law reformers for over 25 years.

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<sup>126</sup> *Ibid* at para 1.32.

<sup>127</sup> Humphrey et al. (2010), henceforth the NatCen study.

<sup>128</sup> *Ibid* at para 1.33.

<sup>129</sup> *Ibid* at para 1.34.

<sup>130</sup> Kerridge (2015), 338.

<sup>131</sup> Administration of Estates Act 1925 s.46(1)(i)(2).

<sup>132</sup> Inheritance and Trustees’ Powers Act 2014 s.1(1) and (2) amend s.46 of the 1925 Act to this effect.

<sup>133</sup> Kerridge (2015), 333. This is because most estates are worth less than the statutory legacy. Indeed, fewer than 2% of intestate estates exceed the value of the higher level of statutory legacy (Law Com No 331 at para 1.85).

<sup>134</sup> NatCen study (2010), 83.

<sup>135</sup> 2011 Report at para 1.86.

Resistance to providing for the deceased’s children may, in part, reside in the fear that to do so would be to support a reactionary world order. As Kerridge observed, “ever since 1925, ‘progress’ seems to have dictated that spouses should get more,”<sup>136</sup> and, as “spouse” often appears to be understood as “wife,”<sup>137</sup> spousal preference can readily be aligned with progressive feminist values. While the 1925 reforms were necessary to correct the vulnerable position in which the then law placed spouses, in an age where many spouses are equal financial partners—and where many people have more than one family—it is not clear why any move to bolster the child’s position should risk being automatically dismissed as “old-fashioned.”<sup>138</sup> Beyond a desire to appear progressive, some commentators also posit that the spouse-centred approach may reflect a “subconscious desire by government” to keep property in the possession of the older generation as a means of ensuring people can fund their retirement and aged care.<sup>139</sup>

Unlike Scots law, English law recognises “no rule of automatic succession or forced heirship.”<sup>140</sup> However, the effects of unfettered testamentary freedom are tempered by allowing the court to modify a will<sup>141</sup> if it is satisfied that reasonable financial provision has not been made for certain classes of individuals.<sup>142</sup> The current rules are set down in the Inheritance (Provision for Family and Dependants) Act 1975 (the 1975 Act) and all children, including adult children, are among those entitled to make a claim.

The limits of testamentary freedom and family obligation in English law have been the focus of considerable media and academic commentary in recent years due to a claim made under the 1975 Act that resulted in a decade-long legal battle.<sup>143</sup> The facts of the case are well-known: Heather Ilott and her mother, Mrs. Jackson, had been estranged since 1978 when, aged 17, Heather left home to live with her boyfriend of

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<sup>136</sup> Kerridge (2015), 333.

<sup>137</sup> See Intro, p21.

<sup>138</sup> Kerridge (2015), 335.

<sup>139</sup> *Ibid.*, 340.

<sup>140</sup> *Ilott v The Blue Cross and others* [2017] UKSC 17 at para 1.

<sup>141</sup> Section 1 of the Inheritance (Provision for Family and Dependants) Act 1975 also provides that the court can amend the disposition of the deceased’s estate effected by the law of intestacy.

<sup>142</sup> Eligible categories of persons are set out in section 1 of the Inheritance (Provision for Family and Dependants) Act 1975.

<sup>143</sup> Proceedings were issued in the Family Division and an order was made in August 2007. The Supreme Court released its judgment in March 2017.

whom Mrs. Jackson disapproved. Despite various attempts over the years, no reconciliation between mother and daughter was reached. As a result, when Mrs. Jackson wrote her last will in 2002 she made no provision for her daughter and instead bequeathed her estate, worth approximately £486,000 to charities with which she had no particular connection.<sup>144</sup>

Mrs. Ilott, who lived in straitened circumstances, made an application for an order under section 2 of the 1975 Act and was awarded £50,000 by a District judge. Mrs. Ilott believed the award was too low and appealed the judge's ruling. There followed a series of appeals and cross appeals<sup>145</sup> and, in 2015, the Court of Appeal increased Mrs. Ilott's award to approximately £163,000.<sup>146</sup> In March 2017, however, the Supreme Court overturned the Court of Appeal's decision and reinstated the original award.<sup>147</sup>

The unanimous judgment, delivered by Lord Hughes, focused on the two errors of principle the Court of Appeal alleged the District judge had made.<sup>148</sup> While the alleged errors do not relate to the themes at issue in this thesis, insofar as wills variation is not a feature of Scots law, the case undoubtedly raised "some profound questions"<sup>149</sup> about family obligation and testamentary freedom. The Court of Appeal reflected on matters such as whether an estrangement should deprive a potential claimant of an award<sup>150</sup> and whether testamentary freedom should take precedence over the needs of a claimant,<sup>151</sup> while the Supreme Court asked, *inter alia*, whether it is in the public interest to provide family members with awards so that the burden of maintenance does not fall upon the state.<sup>152</sup>

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<sup>144</sup> *Ilott v The Blue Cross and others* [2017] UKSC 17 at para 6.

<sup>145</sup> For an overview of the various stages of the case's journey through the courts see Conway, H, "Testamentary freedom, family obligation and the *Ilott* legacy: *Ilott v Blue Cross and others* [2017] UKSC 17 (2017)" 5 *The Conveyancer and Property Lawyer* 372 at 373.

<sup>146</sup> Mrs. Ilott was awarded £143,000 to buy her home and a further capital sum "not exceeding £20,000. She was also awarded "reasonable expenses" for acquiring her home, *Ilott v Mitson and others* [2015] EWCA Civ 797 at paras 62 and 63.

<sup>147</sup> *Ilott v The Blue Cross and others* [2017] UKSC 17 at para 48.

<sup>148</sup> *Ibid* at para 29.

<sup>149</sup> *Ibid* at para 49.

<sup>150</sup> *Ilott v Mitson and others* [2015] EWCA Civ 797 para 51 (v).

<sup>151</sup> *Ibid* at para 51 (iv).

<sup>152</sup> *Ilott v The Blue Cross and others* [2017] UKSC 17 at para 63.

These and other factors were raised by Lady Hale in her supplementary judgment where she lamented the “unsatisfactory state of the present law.”<sup>153</sup> Pointing out that “a respectable case”<sup>154</sup> could be made for at least three different outcomes under English law in *Ilott*, she expressed “regret” that the Law Commission had not considered some of the fundamental principles underlying such claims in its review of intestacy and family provision in English law.<sup>155</sup> These principles will be considered in detail throughout this thesis.

### 1.2.2 British Columbia, Canada

Succession law in Canada is an area of provincial and territorial jurisdiction.<sup>156</sup> In recent years, a number of Canadian provinces have undertaken succession law reform, but the unique approach adopted by British Columbia singles it out as worthy of attention. The British Columbia Law Institute (BCLI) initiated its Succession Law Reform Project in 2003, issuing its final report in 2006.<sup>157</sup> Legislation was enacted in 2009 and came into force in 2014.<sup>158</sup> The Wills Estates and Succession Act (WESA) consolidated a “forest of statutes”<sup>159</sup> and introduced both substantive and procedural reform.

British Columbia adheres to the principle of testamentary freedom and no fixed share is reserved for spouses or children in testate succession. However, statutory provisions have long allowed certain parties to seek relief against a will. The family relief provisions in BC differ from the dependants’ relief statutes in force in most other provinces and territories in that they impose no restrictions on the ability of adult non-spousal claimants to apply for relief.<sup>160</sup> Whereas most Canadian jurisdictions require an adult claimant other than a surviving spouse to demonstrate “an inability to be self-supporting due to illness or mental or physical disability”<sup>161</sup> in

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<sup>153</sup> *Ibid* at para 66.

<sup>154</sup> *Ibid* at para 65.

<sup>155</sup> *Ibid*.

<sup>156</sup> The Constitution Act, 1867 s. 92(13).

<sup>157</sup> British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework* (BCLI Report No. 45, 2006), xiii, henceforth BCLI Report.

<sup>158</sup> Wills, Estates and Succession Regulation (BC Reg #148/2013).

<sup>159</sup> BCLI Report, xiii.

<sup>160</sup> *Ibid*.

<sup>161</sup> *Ibid*, xv.

order to displace the terms of a will, no such requirement operates in BC. Instead, WESA (as did the Wills Variation Act before it)<sup>162</sup> simply states that the court may order such provision as “it thinks adequate, just and equitable in the circumstances.”<sup>163</sup>

In *Tataryn v Tataryn Estate*,<sup>164</sup> the Supreme Court of Canada provided guidance on the factors that a court should consider when interpreting the “adequate, just and equitable” test. *Tataryn* will be discussed in some detail as it articulates a powerful conception of a deceased’s *moral* obligation to his surviving family members, the same obligation that, arguably, justifies the continued existence of a fixed legal share for children in Scotland.

Alex and Mary Tataryn were married for 43 years and together amassed an estate valued at \$315,254. The estate was held in Mr. Tataryn’s name at the time of his death. The couple had two children, John and Edward, but Mr. Tataryn had disliked John from the time he was six years of age. He did not wish to leave any of his estate to John and he feared that if he left any of his estate to his wife in her own right, she would pass it on to John on her death. Consequently, he granted his wife a life interest in the matrimonial home and made her the beneficiary of a discretionary trust. When she died everything in Mr. Tataryn’s estate was to pass to Edward. Upon his death, Mrs. Tataryn was shocked to discover that her husband had left everything to her son Edward and both she and the disinherited son, John, claimed against the estate under the Wills Variation Act. The case eventually made its way to the Supreme Court of Canada.

In delivering the judgment of the court, McLachlin J, as she then was, had no difficulty in explicitly rejecting an entirely needs-based approach to wills variation. Instead, the court held that both legal norms and “moral obligations” must be taken into consideration when determining what constitutes “adequate, just and equitable” provision in the circumstances of a particular case. The court ruled that the “first

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<sup>162</sup> The Wills Variation Act 1996 was repealed by WESA.

<sup>163</sup> WESA s.60.

<sup>164</sup> *Tataryn v Tataryn Estate* [1994] 2 SCR 807. The official report of this case on the Supreme Court of Canada website does not use paragraph numbers to identify sections of the judgment and so none are provided in this section.

consideration” in determining a wills variation case must be the legal responsibilities the testator incurred during his lifetime, as these obligations provide an “important indication of the content of the legal obligation to provide ‘adequate, just and equitable’ maintenance and support which is enforced after death.” Next, McLachlin J held, the court should turn to the testator’s moral duties towards his spouse and children.

It is noteworthy that in this important ruling the Supreme Court of Canada displayed no wariness of broaching the potentially thorny question of moral obligation. This was not because the court was insensitive to differing conceptions of moral obligation in a pluralistic society, but because it held that the “uncertainty” as to society’s common understanding of this particular moral obligation was not “so great as has been sometimes thought.” Thus, the court readily concluded that “while the moral claim of independent adult children may be more tenuous” than the claim of a spouse or dependent child, some provision should be made for adult children “if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation.”<sup>165</sup>

In spite of the court’s clear recognition of a parent’s moral duty, it also recognised the importance of “testamentary autonomy.” Indeed, it stated that any moral duty ascribed to the testator should be “assessed in the light of the deceased’s legitimate concerns.” Thus, although characterising Mr. Tataryn’s dislike of his son as “obsessional,” the court still showed some deference to his testamentary freedom by altering the will in such a way that his “favoured” son still received the larger share of the estate.

Finally, it should also be noted that the biggest “winner” in the case was Mr. Tataryn’s wife. Both brothers were awarded an immediate gift of \$10,000 and, upon Mrs. Tataryn’s death, (unequal) shares in a rental property. The remainder of the

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<sup>165</sup> This conceptualisation of moral obligation stands in contrast to that evoked in *Ilott*. In *Tataryn* the obligation arises from the mere existence of the parent-child relationship; no special circumstances are required. In contrast, a moral claim in *Ilott* is understood to involve “something more than the qualifying relationship.” That said, a “moral claim” is not the only “additional something” that can support a claim under the 1975 Act, although the court noted that “a moral claim will often be at the centre” of such claims (*Ilott v The Blue Cross and others* [2017] UKSC 17 at para 20).

estate was, rightly, granted outright to Mrs. Tataryn. This judgment illustrates that a deceased's moral duty to his children can be recognised without undermining his equally important moral duty to his spouse.

Despite the BC model's "many defenders,"<sup>166</sup> the British Columbia law reform process sought to bring dependants' relief provisions into line with those in other provinces. The recommendation was, however, rejected and the "adequate, just and equitable" language was transposed from the Wills Variation Act and enshrined in section 60 of WESA. The House, sitting as a Committee of the Whole,<sup>167</sup> adopted section 60 with no debate<sup>168</sup> and no evidence of the controversy that surrounds the topic in the UK.

In keeping with both the BCLI recommendations and trends in other jurisdictions, WESA also improved the position for spouses on intestacy. The new legislation increases the "preferential share," applicable where the deceased leaves a spouse and issue, from \$65,000 to \$300,000<sup>169</sup> and allows the spouse to take half of the balance of the estate,<sup>170</sup> regardless of whether the deceased also has issue.<sup>171</sup> The law reformers mitigated the effect of this increase—still modest compared to Scottish standards—on complex families by setting a lower preferential share for surviving spouses who are not also the other parent of the deceased's children.<sup>172</sup> What is striking about the British Columbia reform is that it did not appear to engender the angst that such a discussion has unleashed in the UK. The BCLI Report was clear that the objective of such a provision was to allow the law to reflect the "prevalence of mixed families"<sup>173</sup> and plainly considered the judiciousness of such a suggestion to be self-evident. Parliament was equally unperturbed and the matter gave rise to only very

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<sup>166</sup> BCLI Report, xvi.

<sup>167</sup> A Committee of the Whole is the entire membership of the House of Commons (or in this instance the provincial legislative assembly) sitting as a committee ("Committees of the Whole," *House of Commons Compendium of Procedure* [http://www.parl.gc.ca/About/House/compendium/web-content/c\\_d\\_committeeswhole-e.htm](http://www.parl.gc.ca/About/House/compendium/web-content/c_d_committeeswhole-e.htm)).

<sup>168</sup> Hansard, 24 September 2009, Morning (Vol 3, Number 4), <https://www.leg.bc.ca/documents-data/debate-transcripts/39th-parliament/1st-session/h90924a#780>.

<sup>169</sup> WESA s. 21(3). The increase is discussed in BCLI Report, xvii.

<sup>170</sup> WESA s. 21(6)(b).

<sup>171</sup> The spouse previously took 1/3 if there was more than one child or other surviving issue (BCLI Report, xvii).

<sup>172</sup> WESA s. 21(4).

<sup>173</sup> BCLI Report, 14.

limited discussion, with no suggestion that the reform was unduly harsh for the surviving spouse.<sup>174</sup>

### 1.2.3 Victoria, Australia

As in Canada, succession law in Australia is a question of state and territorial competence. Nevertheless, in 1995<sup>175</sup> the Uniform Succession Laws Project was launched to develop “common rules acceptable to all jurisdictions.”<sup>176</sup> Thus far, only New South Wales (NSW) and Tasmania have implemented the reforms, although the rest of Australia is expected to follow.<sup>177</sup> Victoria is the most recent state to have examined succession law, with the Attorney-General having mandated the Victorian Law Reform Commission (the Commission) to undertake a review of succession law in 2012.<sup>178</sup> The Commission published its Report in 2013, recommending the adoption of many of the proposals set out by the National Committee for Uniform Succession Laws.

Victoria instigated a review of its succession laws for familiar reasons: a desire to ensure that the law operated “in accordance with community expectations;”<sup>179</sup> the need to ensure efficiency and effectiveness; and a wish to reflect socio-demographic changes.<sup>180</sup> While the first socio-demographic factor cited—complex family structures—is mentioned in all of the studies under discussion in this chapter, the Commission also placed a second factor, longer life spans, front and centre of its Report. In doing so the Commission thrust the link between aged care, inheritance and family to the fore, rather than side-stepping it as the SLC and the Law Commission of

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<sup>174</sup> Hansard, 23 September 2009, Morning (Vol 3, Number 3 <https://www.leg.bc.ca/documents-data/debate-transcripts/39th-parliament/1st-session/h90923p#735>). A parliamentarian who was present at the debate observed that “BC has been committed to the old Wills Variation Act position of all children being able to apply, not just dependent children, for such a long time, and given the position of the legal community in support of maintaining that right, I don’t think anyone really gave it much thought one way or the other” (email exchange with the author).

<sup>175</sup> New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy* (Report 116, 2007) at para 1.47.

<sup>176</sup> Peart, N and Vines, P, “Intestate Succession in Australia and New Zealand” in Reid et al. (eds) (2015), 357.

<sup>177</sup> *Ibid.* Legislation that would implement some of the reforms is currently before the Victorian Parliament (Victorian Law Reform Commission, *Succession Laws*, <http://www.lawreform.vic.gov.au/all-projects/succession-laws> )

<sup>178</sup> Victorian Law Reform Commission, *Succession Laws: Final Report* (2013) at para 1.1, henceforth the 2013 Report.

<sup>179</sup> *Ibid.*, x.

<sup>180</sup> *Ibid.*, xiv.

England and Wales have done. While no Law Commission report can examine all questions that potentially flow from succession law, the interplay between aged care and inheritance is increasingly evident and it is commendable that the Victorian Law Commission confronted it head on.

The effect of increased longevity has an impact on both the bequeather and the potential beneficiary. With regard to the bequeather, the Commission addressed concerns about individuals becoming more vulnerable as they age and consequently at greater risk of being subject to undue influence from potential beneficiaries.<sup>181</sup> This is a topic that was also raised both in the BCLI Report<sup>182</sup> and by several participants in my research project.<sup>183</sup> However, while it is worthy of further consideration, it is beyond the scope of this thesis. With regard to potential beneficiaries, the Commission considered how inheritance is being “transformed from financial assistance that helps the children establish themselves in life into the guarantee of a financially secure retirement.”<sup>184</sup> This in turn raises two questions: firstly, whether potential beneficiaries are relying on an anticipated inheritance instead of planning for retirement;<sup>185</sup> and secondly, whether people have the right to conserve resources to provide for their children rather than using them to pay for care costs.

Unsurprisingly, the Commission’s Report also addressed the question of spousal entitlement. Under the legislation in force at the time the Commission’s Report was written, the partner of an intestate who left a child (or other issue) was entitled to the whole of the intestate’s residuary estate if it was worth less than \$100,000, and \$100,000 plus one third of the balance where it was worth more than \$100,000.<sup>186</sup> The Commission recommended that the statutory legacy be raised to \$350,000 (approximately £197,000), an amount that is again significantly lower than the proposed threshold sum in Scotland.

While the Victorian approach to the value of the statutory legacy conforms to that adopted in British Columbia, the Commission recommended an alternative approach

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<sup>181</sup> *Ibid*, Chapter 2.

<sup>182</sup> BCLI Report, 53.

<sup>183</sup> Gladys, Aileen, Joan. All names are pseudonyms. For full participant information, see Appendix 2.

<sup>184</sup> 2013 Report, ix.

<sup>185</sup> A question also raised in Rowlingson and McKay (2005), 6 (discussed below at 1.4.3).

<sup>186</sup> Administration and Probate Act 1958 s.51(2).

to distributing intestate estates in the context of complex families. Whereas British Columbia favoured a *lower* preferential share (statutory legacy) where the surviving spouse was not also the other parent of the deceased's children, the Commission, following the recommendation of the National Committee for Uniform Succession Laws, recommended simply removing the children's entitlement where the surviving spouse was the other parent of all of the deceased's children. It was reasoned that this would avoid "unnecessary complexity, given that those children could expect to inherit from their other parent in later life."<sup>187</sup> In other words, although a different approach is adopted, Victoria, like British Columbia, did not hesitate to acknowledge that the deceased's responsibilities vary depending on whether he is a member of one or more family units.

The Report made two further recommendations that are of interest to this thesis. Firstly, the Commission recommended limiting the categories of next of kin who are entitled to inherit on intestacy.<sup>188</sup> Under the legislation then in force, Victoria, like Scotland, imposed no limit on those who were entitled to inherit. Victoria was the only Australian state not to limit next of kin on intestacy and the Commission recommended bringing Victorian law on this matter into line with the rest of Australia by ending entitlement to inherit on intestacy at first cousins.<sup>189</sup>

Finally, as in England and Wales, the Victorian model does not provide automatic entitlements for spouses or children in testate succession, relying instead on a form of dependants' relief provisions. Prior to the reform process, the Victorian provisions were very generous and any person was able to apply for a court order to redistribute an estate in their favour.<sup>190</sup> Although the Commission moved to restrict the categories of those eligible to seek variation of a will, it nonetheless included stepchildren as a category of eligible claimants in its proposed legislation.<sup>191</sup> On this point, the Commission noted that "step-parents may also have a responsibility to provide for their stepchildren, where the relationship is akin to a parent-child relationship or where the step-parent's estate was largely derived from the stepchild's natural

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<sup>187</sup> 2013 Report at para 5.120.

<sup>188</sup> *Ibid* at para 5.20.

<sup>189</sup> *Ibid* at para 5.25.

<sup>190</sup> *Ibid* at para 6.1.

<sup>191</sup> *Ibid* at paras 6.52 and 6.87.

parent.”<sup>192</sup> Interestingly, another argument advanced in favour of including stepchildren as eligible family provision applicants was that it would encourage step-parents to provide for their stepchildren so as to avoid litigation.<sup>193</sup>

### 1.3 The Scottish Empirical Studies

#### 1.3.1 The Scottish Consumer Council Study

The Scottish Consumer Council (SCC) carried out a comparatively small-scale study entitled “Wills and Awareness of Inheritance Rights in Scotland.”<sup>194</sup> The study commissioned TSN system 3 to conduct the survey as part of an omnibus poll. A sample of 1009 adults was surveyed and the findings were published in 2006.<sup>195</sup> The SCC was motivated to study the question due to concern that people were unaware of the unintended consequences of their decision not to make a will.<sup>196</sup> The study therefore sought to test public knowledge of intestacy provisions with a view to providing a “useful baseline for future work in raising public awareness.”<sup>197</sup> Consequently, the questions were based not on what the law *should* do but on what it does do. The study did not seek to make policy suggestions but was nevertheless taken into consideration by the SLC in its deliberations.<sup>198</sup>

The research focused primarily on cohabitants and the succession rights of children within non-traditional family structures. In relation to the latter group, the survey noted that only 50% of respondents knew that the stepchildren of a deceased person have fewer rights than their own children.<sup>199</sup> It cited this as cause for particular concern as three-quarters of respondents with children in their household were found not have a will.<sup>200</sup> While making no recommendation, the SCC points out that “in the increasingly common situation where a cohabiting couple live with children who are

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<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid* at para 6.82.

<sup>194</sup> O’Neill (2006).

<sup>195</sup> O’Neill (2006), 5.

<sup>196</sup> *Ibid*, Preface.

<sup>197</sup> *Ibid.*

<sup>198</sup> Scottish Law Commission, *Discussion Paper on Succession*, (DP No 136, 2007) at para 1.4.

<sup>199</sup> O’Neill (2006), 25.

<sup>200</sup> *Ibid.*

the stepchildren of one or both partners” the lack of will could make the situation for the surviving partner even more difficult.<sup>201</sup>

### 1.3.2 The 2005 Succession Opinion Survey

The most important study for the purposes of the current Scottish reform process was undoubtedly the 2005 Omnibus Survey commissioned on behalf of the Scottish Law Commission<sup>202</sup> (the 2005 Survey). The study was quantitative in nature and comprised 1008 interviews with a representative sample of the Scottish population.<sup>203</sup> While the overarching aim of the survey was to “explore attitudes among Scottish adults towards the law of succession,” two specific goals were identified.<sup>204</sup> Firstly, the researchers sought to “test the level of public agreement” with the SLC’s 1990 recommendations; and, secondly they looked to explore attitudes on three key questions, namely intestacy, protection from disinheritance and cohabiting couples.<sup>205</sup> Given the scope of this thesis, only the questions relating to disinheritance and intestacy will be considered in this section, beginning with those relating to intestacy.

Participants were asked five questions relating to intestacy and, while the questions are not inherently without merit, they almost entirely disregarded the thorny topic of competition between first families and second families, focusing instead on division between a surviving parent and their children. This is regrettable as it is well established that a parent inheriting ahead of his own children rarely engenders conflict due to the “reasonable expectation” of the children that they will inherit when the second parent dies.<sup>206</sup> Nevertheless, the researchers stuck steadfastly to the nuclear family stereotype when exploring competition between spouses and children. Question two asked participants whether they agreed that the spouse should receive everything (and the children nothing) no matter how large the estate, and question three asked whether the children should receive a half-share of any amount over the threshold sum.<sup>207</sup> Forty-six percent agreed with the first statement<sup>208</sup> while sixty-

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<sup>201</sup> *Ibid.*

<sup>202</sup> 2005 Survey at para 1.4.

<sup>203</sup> *Ibid* at paras 1.8-1.10.

<sup>204</sup> *Ibid* at para 1.5.

<sup>205</sup> *Ibid.*

<sup>206</sup> Discussion Paper No 136 at para 2.66.

<sup>207</sup> 2005 Survey at paras 2.5-2.9.

seven percent agreed with the second statement.<sup>209</sup> Thus, even in the traditional family context—despite strong support for the spouse—the participants wanted the children to be recognised in some way. It is difficult to conceive that this preference would be anything but stronger were the surviving spouse not the parent of the deceased’s children, but this important question went unexamined.

At first blush, questions four and five, which focus on stepchildren, engaged with complex families. However, on closer examination, it is evident that the researchers again failed to focus on the first family/second family dynamic. In question four, participants were simply asked if the stepchildren should receive anything from the estate of a stepfather who, it would appear, had no other surviving family members.<sup>210</sup> Even question five, which asked whether a stepfather should treat his stepchild in “the same way” as his “own” children,<sup>211</sup> arguably addressed the principle of equal treatment between siblings as much as the dynamic between first families and second families. The difficulty of generating meaningful data from such blunt questions on stepfamilies was recognised by the SLC. In its analysis of the findings, it acknowledged that participants might have had in mind a situation where a child had been raised by a step-parent since infancy.<sup>212</sup> This is of course a legitimate avenue to explore, but without also considering those cases where the stepchild and step-parent have no relationship, it provides only very partial insight into attitudes towards stepchildren’s entitlement.

The remaining question on intestacy addressed the surviving spouse’s entitlement to inherit everything where there are no children.<sup>213</sup> The spouse’s entitlement to the whole estate in such cases is generally non-contentious and it was therefore unsurprising that 88% of respondents supported this proposition.<sup>214</sup>

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<sup>208</sup> The Scottish Government points out that this in fact suggests lower levels of support for the spouse receiving everything than were found in the 1986 Survey in which 51% agreed that the man’s estate should be left entirely to his wife (*ibid* at para 2.7). The 1986 Survey is discussed below at 1.3.3.

<sup>209</sup> *Ibid* at para 2.9.

<sup>210</sup> *Ibid* at para 2.10.

<sup>211</sup> The contested nature of terms such as “natural children” will be discussed in Chapter 6, 6.3.

<sup>212</sup> Discussion Paper No 136 at para 2.73.

<sup>213</sup> 2005 Survey at para 2.3.

<sup>214</sup> *Ibid*

The second group of questions in the 2005 Survey focused on disinheritance in testate succession. The questions invited participants to evaluate the relative importance of testamentary freedom versus family obligation. Once again, however, the researchers skirted the issue of first families and second families, preferring to concentrate on scenarios that placed the disappointed beneficiary in competition with charities. This seems unusual as studies suggest that only around 6% of Britons make a bequest of any size to charity, with some figures suggesting that this figure may be lower for Scotland.<sup>215</sup> Furthermore, making a donation to charity does not mean that the charity is taking the whole estate; indeed, the median gift made by charitable bequest is £1000.<sup>216</sup> As such, it would seem that the disappointed beneficiary is more likely to be in competition with a surviving spouse or another child than with a charity. It is unclear why the researchers chose this focus as it distracted from more contentious questions, such as situations where a child is excluded from a will at the expense of a second spouse.

Nevertheless, four of the seven questions on disinheritance involved asking participants whether certain individuals should be entitled to displace the terms of a will bequeathing the deceased's entire estate to charity. The researchers identified the woman's husband, dependent children, adult children and young stepchildren as potential challengers.<sup>217</sup> In all instances, the majority agreed that the surviving family members should be entitled to make a claim, although in all cases a minority believed that testamentary freedom reigned supreme.<sup>218</sup> Overall, it is clear that the concept of automatic entitlements did not appear to perturb the participants, a point that the SLC clearly recognises:<sup>219</sup>

The public attitudes surveys in 1979, 1986 and 2005 have consistently shown strong support for providing some protection from disinheritance for the deceased's surviving spouse and children. Even where the deceased leave's the whole estate to a surviving spouse, a substantial proportion...still thought that any children should be entitled to claim a share.

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<sup>215</sup> Atkinson, AB, Backus, PG and Micklewright, J, "Charitable bequests and wealth at death in Great Britain," (2009), *S3RI Policy Working Papers*, A09/03, 24-25. The researchers found that while *inter vivos* giving was higher in Scotland, only 11% of Scottish wills, compared to 16% for Great Britain as a whole, contained charitable donations.

<sup>216</sup> *Ibid*, 32.

<sup>217</sup> 2005 Survey at paras 2.14-2.24.

<sup>218</sup> *Ibid*.

<sup>219</sup> Discussion Paper No 136 at para 3.2.

This raises questions as to why the SLC then chose to favour a model that will, in the overwhelming majority of cases, effectively prevent children from claiming a share of their parent's estate.

Of the three remaining questions, one addressed the "duty" of the testator to treat his children equally.<sup>220</sup> This important question generated extensive discussion in my discussion groups and will be explored in Chapter 4. A further question addressed the duty of the stepmother to treat her stepchildren as she would her "own" children,<sup>221</sup> while the last question placed the children in competition with their other parent.<sup>222</sup> These questions were also addressed in the series of questions on intestacy and the same conclusions can be drawn: the public displays strong support for stepchildren<sup>223</sup> and, even in a nuclear family context, there is support for the children being able to make a claim on the deceased parent's estate.<sup>224</sup> Thus, in general, the participants did not appear unduly attached to unfettered testamentary freedom and displayed considerable comfort with allowing the disappointed beneficiary to make a claim.

In summary, the 2005 Survey provides some useful general data on attitudes towards inheritance in Scotland but its value is undermined by its failure to explore the complex question of first families and second families. Furthermore, despite having had the survey commissioned, the SLC appeared to disregard it almost entirely. While the questions on intestacy undoubtedly revealed high levels of support for the spouse, they also clearly demonstrated considerable support for the children. The SLC intestacy proposals, however, did not reflect this latter finding. A similar observation can be made with regard to the data on disinheritance. Although the public supports entitlements for spouses and all children in testate succession, only spouses are provided with a *meaningful* entitlement under the reform proposals.

### 1.3.3 The 1986 Survey

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<sup>220</sup> 2005 Survey at para 2.27.

<sup>221</sup> *Ibid* at para 2.25.

<sup>222</sup> *Ibid* at para 2.31.

<sup>223</sup> *Ibid* at para 2.26.

<sup>224</sup> *Ibid* at para 2.31.

It should be noted that, as part of the current review process, the SLC also relied on the opinion survey it commissioned from System Three Scotland in 1986. The survey sample was almost identical in size to that used in the 2005 Survey and was again representative of the Scottish public.<sup>225</sup> The survey was also similar in structure in that a series of questions on intestacy was followed by a series of questions on disinheritance. However, although the 1986 Survey was also quantitative in nature, it was far more nuanced than its 2005 successor. For example, the participants were invited to consider whether their views on the respective parties' entitlement would change depending on the deceased's wealth.<sup>226</sup> Furthermore, they were presented with various options for splitting the estate – entirely to his wife, mainly to his wife, half to his wife etc.<sup>227</sup>—as opposed to simply being asked whether various family members should be allowed to receive “something”<sup>228</sup> or a non-specified “fixed” amount.<sup>229</sup>

Most importantly, the 1986 Survey also considered the possibility of a second marriage and concluded that it had “a considerable bearing on attitudes.”<sup>230</sup> Although the second spouse was “still seen as the major beneficiary,”<sup>231</sup> there was recognition that the deceased owed a duty to more than one family unit in such circumstances. It is unclear why this line of enquiry was not maintained in the 2005 Survey.

Finally, although the SLC commissioned the 1986 Survey because it believed public opinion on the matter to be of the “greatest importance” given that succession law “affects every member of the community,”<sup>232</sup> the research findings were not fully reflected in either the 1990 Report or the 2009 Report. While the 1990 recommendations may be slightly more in line with public opinion insofar as the threshold sum was set at a lower level,<sup>233</sup> the direction of change was set and the supremacy of the spouse confirmed.

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<sup>225</sup> 1986 Survey, 226.

<sup>226</sup> *Ibid*, 227.

<sup>227</sup> *Ibid*.

<sup>228</sup> 2005 Survey at para 2.10.

<sup>229</sup> *Ibid* at para 2.8.

<sup>230</sup> 1986 Survey, 228.

<sup>231</sup> *Ibid*.

<sup>232</sup> *Ibid* at para 1.19.

<sup>233</sup> The SLC recommended that the spouse receive the first £100,000 (1990 Report at para 2.7), which would be worth around £224,000 today, see <http://www.thisismoney.co.uk/money/bills/article-1633409/Historic-inflation-calculator-value-money-changed-1900.html>.

## 1.4 Empirical studies in other jurisdictions

In stark contrast to Scotland, England has provided a rich seam of studies evaluating public attitudes towards inheritance. In the last 15 years three major studies have been conducted, all of which will be referenced frequently in this thesis. This section will also provide an overview of the Australian study that features prominently in the thesis.

### 1.4.1 Finch and Mason

Finch and Mason undertook an inheritance project in the 1990s with a view to discovering how inheritance was handled in “ordinary” families. For the purposes of the study, the term “ordinary families” was applied broadly to include all families who had “not owned considerable wealth or land over several generations.”<sup>234</sup> The study comprised three elements: the analysis of a randomly selected sample of 800 probated wills; a set of 88 in-depth interviews with 98 people; and, a set of 30 semi-structured interviews with solicitors and other professionals.<sup>235</sup> The detailed findings of this important study will be explored in detail where relevant to my research. However, some general observations bear consideration at this juncture in order to provide an overview of the themes that will be discussed in subsequent chapters.

Firstly, the researchers characterised the English system as one that privileges testamentary freedom, with restrictions being said to operate “very much at the margins of the system.”<sup>236</sup> While the contention that the provisions of the Inheritance (Provision for Family and Dependants) Act 1975 operate at the margins of the system can be questioned,<sup>237</sup> the English system of testate succession is certainly different from the Scottish system in that it does not include automatic status-based entitlements. The question of the relative entitlements of children and spouses (one of

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<sup>234</sup> Finch and Mason (2000), 2.

<sup>235</sup> *Ibid*, 23.

<sup>236</sup> *Ibid*, 3.

<sup>237</sup> 1975 Act disputes are on the rise meaning that the Act is playing an increasingly important role. See, for example, Napley, K, “Inheritance claims by spouses rise with number of remarriages”, 16 April 2013, available at <http://www.lexology.com/library/detail.aspx?g=4636560b-3779-4004-b38d-af84b5b6d218>; Milmo, C, “Where there’s a will... Family feuds lead to a 700% increase in High Court Disputes in five years” *The Independent*, 31 January 2013, available at <http://www.independent.co.uk/news/uk/home-news/where-theres-a-will-family-feuds-lead-to-700-increase-in-high-court-disputes-in-five-years-8475962.html>.

the questions at the heart of the SLC reform process)<sup>238</sup> therefore relates primarily to *intestate* succession in the English legal context.<sup>239</sup> Finch and Mason's study, however, related primarily to *testate* succession. Nevertheless, although the study set out to determine inheritance practices in the context of will-making, it revealed a great deal not only about what people do, but also about what they feel *ought* to happen. Indeed, Finch and Mason used "the concept of narrative as a methodological and analytical device...to communicate accounts and scenarios that people recognize and, most notably, that they fear."<sup>240</sup> As the narratives primarily focused on scenarios participants actively sought to avoid, they did not represent "an empirical and generalisable reality of kinship," but, rather, provided powerful insight into "people's practices and moral reasoning."<sup>241</sup> Thus, the study provided a wealth of information as to people's views on obligation between family members and, in doing so, illuminated our understanding of both testate and intestate succession.<sup>242</sup>

The purpose of the study was not to evaluate options for legislative reform but, rather, to consider inheritance as a means both of studying and constituting kinship.<sup>243</sup> Thus, the researchers concentrated on personal relationships and the way in which individuals use inheritance as a means of confirming these relationships. Regarding the parent-child relationship, the researchers made several key findings: firstly, inheritance practices which recognise the parent-child relationship (and indeed other relationships) are "relationally" more than materially driven;<sup>244</sup> secondly, inheritance itself is viewed as a form of parenting, and "good parenting" practice in this context involves both the equal treatment of all children<sup>245</sup> and reconfirming the relationship

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<sup>238</sup> The other major question being the entitlement of cohabitants.

<sup>239</sup> Although the English system of testate succession does not attempt to balance the relative entitlements of spouses and children by providing legal rights, the financial needs of other beneficiaries and claimants are also taken into consideration when an application is made by an individual under the Inheritance (Provision for Family and Dependants) Act 1974 per s. 3(1)(b)(c). In other words, there are cases where the *relative* entitlement of spouses and children could be evaluated in testate claims.

<sup>240</sup> Finch and Mason (2000), 165.

<sup>241</sup> *Ibid.*

<sup>242</sup> The rules governing intestate succession are generally understood to reflect a testator's wishes and/or duties (see, for example, discussion in Reid, KGC, De Waal, MJ and Zimmerman, R. "Intestate Succession in Historical and Comparative Perspective" in Reid, KGC, De Waal, MJ and Zimmermann, R. (eds), *Comparative Succession Law, Volume II: Intestate Succession* (Oxford University Press, 2015), 446).

<sup>243</sup> Finch and Mason (2000), 11-12.

<sup>244</sup> *Ibid.*, 173.

<sup>245</sup> *Ibid.*, 175.

at the end of the parent's life;<sup>246</sup> and, finally, while English kinship is, in general, highly flexible, it is shot through by a "core thread of fixity" in the form of the continuing relationship between parents and children.<sup>247</sup>

The study placed a particular emphasis on complex families and the empirical study began with a detailed case study of inheritance in such families. Complex families were held to be those with a history of "divorce, cohabitation following divorce, remarriage, step-relationships or a combination of these experiences."<sup>248</sup> The researchers found that, while it was clear that a spouse had to be provided for ahead of adult children,<sup>249</sup> first and second marriages were viewed as "not quite equivalent" for inheritance purposes, with the second spouse's claims on resources flowing from the previous marriage regarded as "somewhat ambiguous."<sup>250</sup> Thus, even in complex families, despite the legitimate claims of the second spouse, the parent-child relationship remained both "predictable and privileged"<sup>251</sup> in relation to inheritance.<sup>252</sup>

#### 1.4.2 The NatCen Study

The Law Commission of England and Wales commissioned the NatCen study as part of its law reform process<sup>253</sup> with a view to gaining an understanding both of the range of views held by the public and the reasons behind them.<sup>254</sup> Interestingly, the decision to mandate a study appears to have been motivated, at least in part, by the SLC's earlier decision to conduct attitudinal research as part of its review of succession law.<sup>255</sup> Clearly, however, the NatCen study raised the bar and proved to be far more comprehensive than the Scottish 2005 Survey.

Unlike the 2005 Survey, which paid only scant attention to complex families, the NatCen study established the exploration of different attitudes between different

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<sup>246</sup> *Ibid*, 59.

<sup>247</sup> *Ibid*.

<sup>248</sup> *Ibid*, 25.

<sup>249</sup> *Ibid*, 31.

<sup>250</sup> *Ibid*, 37.

<sup>251</sup> *Ibid*, 59.

<sup>252</sup> Finally, the researchers also carried out a case study to explore questions of ownership, in particular as they relate to financing old age.

<sup>253</sup> 2011 Report at para 1.31.

<sup>254</sup> *Ibid* at para 1.32.

<sup>255</sup> Consultation Paper 191 at para 1.43.

groups—“particularly those with children from more than one relationship, step-parents and cohabitants”—as one of its two overarching objectives from the outset.<sup>256</sup> The study comprised an initial quantitative survey followed by 30 in-depth qualitative interviews with people who had taken part in the survey.<sup>257</sup> Like its Scottish counterpart, the survey was carried out as part of an omnibus survey, although the NatCen model then used a second wave of questions to boost the number of respondents in certain key groups. Consistent with the study’s stated aims, the second wave of questions focused, *inter alia*, on those who had children from a previous relationship, and those who had parents who had re-partnered.<sup>258</sup>

The researchers found that attitudes towards entitlement in inheritance and intestacy were “largely framed by the bilateral relationship between the deceased and a potential beneficiary,” a relationship participants evaluated both on objective properties (type of relationship e.g. spouse) and subjective properties (e.g. emotional closeness).<sup>259</sup> However, while the bilateral relationship was the cornerstone of the analysis framework used by the NatCen researchers, they also identified a number of non-relationship principles central to understanding how people viewed the relative entitlement of potential beneficiaries. These principles were categorised into four groups: responsibilities and expectations; definitions of fairness; practicalities; and personal autonomy.<sup>260</sup> All four principles were also evident in my research project and will be central themes in all of the data analysis chapters.

Crucially, in the NatCen study, as in my study, the views expressed were often in conflict with one another. For example, participants generally voiced support for the principle of personal autonomy, yet many retreated considerably from this principle when they believed the individual was exercising his autonomy unfairly.<sup>261</sup> The lack of a single, consistent view—although unsurprising—is one of the reasons that the merits of the absolutist traditions of the current legislative framework (and of the proposed reforms) are not always self-evident. In some instances, a degree of

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<sup>256</sup> NatCen Study (2010), 7.

<sup>257</sup> *Ibid*, 8.

<sup>258</sup> *Ibid*.

<sup>259</sup> *Ibid*, 19.

<sup>260</sup> *Ibid*, 20.

<sup>261</sup> *Ibid*, 35. This will be discussed in further detail in Chapter 4, 4.4.1.

flexibility may allow the law to better meet public expectation, although this must always be balanced against the need for certainty.

While the Finch and Mason study focused on attitudes to inheritance with a view to understanding kin relations, the NatCen study analysed attitudes to inheritance with a view to informing a reform process. Nonetheless, there was extensive commonality between the findings of the two studies, particularly with regard to complex families. Like Finch and Mason, the NatCen study also suggested that the claims of first spouses and second spouses were not equivalent (at least where the earlier relationship produced children). In cases where the surviving spouse was not also the other parent of the deceased's adult children, only 15% of participants in the NatCen study stated that the surviving spouse should receive the entire estate,<sup>262</sup> compared to 51% for first spouses.<sup>263</sup> Here too, however, the data in no way constituted a rejection of the second spouse receiving some, or indeed the majority of the estate, simply that some provision also had to be made for the first family, as represented by the issue.

The unease expressed at the prospect of the second spouse inheriting the entire estate relates to another key finding: namely that where respondents with children had made their spouse the main beneficiary of their estate, it was usually assumed that the estate would eventually pass to the children.<sup>264</sup> However, this belief was only held in situations where the surviving spouse was also the other parent of the deceased's children. Where this was not the case, it was found that the second spouse could not be trusted to provide for the children and that separate provision was needed.<sup>265</sup> It is exactly this concern that underpins the intestate models in jurisdictions such as British Columbia and Australia, as discussed above.

While the NatCen survey did not address attitudes towards stepchildren, the question was raised by participants in the qualitative section.<sup>266</sup> The attitudes expressed by the participants were unsurprising insofar as they were consistent with those expressed in

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<sup>262</sup> *Ibid.*, 49.

<sup>263</sup> *Ibid.* It is perhaps unfortunate that the researchers opted to feature a second wife rather than a second husband in the scenario, as the possibility of participants' attitudes being influenced by stereotypical tropes of the gold-digging second wife cannot be discounted.

<sup>264</sup> *Ibid.*, 32.

<sup>265</sup> *Ibid.*, 83.

<sup>266</sup> *Ibid.*, 59.

other studies: participants often distinguished stepchildren from a deceased's own children, but it did not always follow that they wanted stepchildren to be excluded from any inheritance.<sup>267</sup> Instead, participants tended to determine entitlement based on a series of factors such as whether the stepchild had been treated as part of the family unit.<sup>268</sup>

Overall, the NatCen study found that inheritance was still centred on a narrow nuclear family model consisting of spouse and partner, children, parents, siblings and grandchildren.<sup>269</sup> In this the study echoes Finch and Mason's finding that the "inheritance" family is anchored in partnership and parenthood.<sup>270</sup> The NatCen researchers were clear, however, that this nuclear family model is not necessarily predicated on a permanent relationship through an unbroken marriage between heterosexuals.<sup>271</sup> The partners in the new family may be cohabitants or same-sex spouses, and one or both may have children from a previous relationship who may or may not live with the new family unit. Thus, while the researchers concluded that there was strong public support for law reform to address new family models, they argued that the new legislative framework should also ensure that the interests of children from the deceased's current and former relationships should be recognised by the intestacy rules. Furthermore, the participants based their support for children's entitlement on the close bond between parents and their children, as opposed to need, and made little distinction between young children and adult children.<sup>272</sup> It is again worth noting that these findings in no way undermine the importance accorded to the spousal relationship, and the participants' concerns cannot be interpreted as a call to favour the children at the expense of the spouse.

### 1.4.3. The Rowntree study

The third of the major English studies was commissioned by the Joseph Rowntree Foundation to address a perceived gap in knowledge as to public attitudes to inheritance.<sup>273</sup> The study, which contained both quantitative and qualitative elements,

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<sup>267</sup> *Ibid.*, 59 and 9.

<sup>268</sup> *Ibid.*

<sup>269</sup> *Ibid.*, 10.

<sup>270</sup> Finch and Mason (2010), 86.

<sup>271</sup> NatCen study (2010), 10.

<sup>272</sup> *Ibid.*, 82.

<sup>273</sup> Rowlingson and McKay (2005), x, henceforth the Rowntree study.

was conducted by Karen Rowlingson and Stephen McKay. The quantitative study was the centrepiece of the project and comprised 2008 interviews, 1066 based on random sampling and 942 based on quota sampling. This was followed by four focus groups with owner-occupiers.<sup>274</sup> Unlike the previous two studies, the primary aim of this study was to address questions of economic policy, particularly with regard to asset accumulation and use in later life.<sup>275</sup> Nevertheless, in asking how people planned to use their assets in later life, the researchers also generated important data on intergenerational solidarity, kinship and parenthood.

The Rowntree study also provided insight into attitudinal differences based on age. The researchers found that “support for the concept of inheritance appears to be at a modest level among those aged 18-29” and at its lowest level for those in their fifties and sixties.<sup>276</sup> Support for inheritance reached its peak level among those aged 80 or more. The researchers posited that this could be attributed to “an ageing effect”<sup>277</sup> which impacts on support for the notion of intergenerational solidarity. In essence, both young people and those who have young children tend to support intergenerational solidarity because they identify strongly either as a parent or a child; however, as people reach their fifties, their minds turn to their own retirement and they focus on the money they will need to maintain their own standard of living. Once they reach their seventies and eighties, and perhaps become closer to their families through grandparenthood or receiving care, a “resurgence of support for intergenerational solidarity” can be detected.<sup>278</sup>

The researchers also found that those aged 45 and over who had not had children scored lowest both on their attitudes to intergenerational solidarity and on whether they would like to leave money behind.<sup>279</sup> This is cited not to suggest that those who do not have children are inherently selfish, but rather to suggest that inheritance

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<sup>274</sup> *Ibid*, 4.

<sup>275</sup> *Ibid*, 1.

<sup>276</sup> *Ibid*, 42.

<sup>277</sup> *Ibid*.

<sup>278</sup> *Ibid*.

<sup>279</sup> *Ibid*, 47.

appears to be “more important to those who have children”<sup>280</sup> perhaps because, as Finch and Mason suggest, it is seen as an act of parenting.<sup>281</sup>

Given the stated intention to explore the use of assets in later life, it is unsurprising that the study addressed the question of the state’s right to an older person’s assets, a question that is explored in this thesis.

#### 1.4.4 The AHURI study

As mentioned previously, Scotland is not alone in facing socio-demographic shifts and, consequently, several other jurisdictions are also looking to reform both their succession laws and the way in which they fund elder care. Conscious that older people may need to use their housing assets to fund retirement, the Australian federal, state and territorial governments funded a study into intergenerational and intrafamilial housing transfers and shifts in later life. The study focused on two main questions: firstly, the experiences of mid-life and later-age Australians with regard to present housing tenure and future housing intentions, including the intergenerational transfer of assets; and, secondly, how older Australians expect those transfers to affect the economic and social circumstances of younger family members.<sup>282</sup> The study comprised both quantitative and qualitative components, with a national survey of almost 7000 Australians being followed by eight focus groups and two internet chat room discussions.<sup>283</sup>

The study explores family obligation in a nuclear family context. That is to say, while many of the participants may have been part of complex families, the study focused on participants’ sense of duty towards their children and grandchildren, as opposed to their relative sense of duty towards stepchildren or second partner’s children. In other words, the study placed the older adult in competition with both adult children and the state and did not directly consider competition between first families and second families. Nevertheless, the qualitative study revealed both high levels of hostility

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<sup>280</sup> *Ibid*, 44.

<sup>281</sup> Finch and Mason (2000), 123.

<sup>282</sup> Olsberg, D and Winters, M, *Ageing in Place: Intergenerational and Intrafamilial Housing Transfers and Shifts in Later Life* (Australian Housing and Urban Research Institute, 2005), vi, henceforth the AHURI study.

<sup>283</sup> *Ibid*, 20-25.

between children of first families and second families and the expectation that the hostility would result in conflict over inheritance.<sup>284</sup>

Despite setting out to address economic policy concerns, the study generated a significant amount of data about the parent-child relationship and the findings were at times surprising. In particular, the researchers were surprised at the high levels of hostility expressed by parents towards their children.<sup>285</sup> The prospect of living with children in an intergenerational setting was almost universally viewed in a negative light and resentment and disappointment appeared to be the hallmark of many relationships.<sup>286</sup> However, several factors may be at play: firstly, the study was not randomised and so those with a “story to tell” may have been more inclined to participate; and, secondly, vilifying their children may have been a means for participants to assuage their own guilt at not being able to leave an inheritance, an act that has long been considered to be “the done thing” in Australia.<sup>287</sup> In particular, however, the anger seems directed at profligate baby boomers, as opposed to children in general.<sup>288</sup> Indeed, while older Australians felt that their baby-boomer children were undeserving, they felt quite differently about their generation X or Y grandchildren.<sup>289</sup>

Furthermore, regardless of the surprise outpouring of resentment, the researchers were careful to stress that a significant number of older adults (36%) had nonetheless provided their children and other younger family members with financial assistance to purchase a home,<sup>290</sup> while most said they would like to leave something to their children.<sup>291</sup> Finally, as in the Rowntree study, the presence of children was a factor that influenced people’s desire to pass on,<sup>292</sup> again speaking to the role of inheritance in confirming the parent-child relationship.

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<sup>284</sup> *Ibid*, 93.

<sup>285</sup> *Ibid*, 83.

<sup>286</sup> *Ibid*, 82.

<sup>287</sup> *Ibid*, 92.

<sup>288</sup> *Ibid*, 72, 93.

<sup>289</sup> *Ibid*, 72.

<sup>290</sup> *Ibid*, 62.

<sup>291</sup> *Ibid*, xiii, 92.

<sup>292</sup> *Ibid*, 71.

## 1.5 Conclusion

First and foremost, forced heirship provisions<sup>293</sup> and the rules of intestate succession provide a system for distributing a deceased person's estate. However, beyond this essential practical function, succession law also communicates an important symbolic message as to who "counts" in a person's family. There is no question that socio-demographic change can influence societal expectations as to whom the deceased owes an obligation upon death: as will be discussed in Chapter 6, adopted children and illegitimate children were not considered to be "rightful" recipients of their parents' estate until relatively recently.<sup>294</sup> Similarly, prior to 2006, a cohabitant had no recourse where his partner had not provided for him in her will.<sup>295</sup> Recent years have seen social change continue and different family models gain increasing social acceptability and support. The question with which this thesis is seized, however, is whether the SLCs proposed changes can be justified by these societal changes. In short, have attitudes as to whom the deceased owes an obligation changed in recent years?

As has been demonstrated, the Scottish attitudinal research failed to engage meaningfully with this question, in particular with regard to complex families, and attention was therefore turned to studies undertaken in England and Wales and, in one instance, Australia. Although England and Scotland (and Australia) may have different legal traditions, the studies spoke not to the specificities of the legal regimes, but to narratives of love, family, obligation and expectation. Given the shared cultural history of the three jurisdictions, it was expected that there would be considerable overlap between the attitudes and values revealed in these studies and those revealed in my own research.

All four studies showed that, where resources allowed, people expected both to leave a bequest to their children and to receive an inheritance from their parents. In particular, the NatCen study and Finch and Mason's study showed that, although primacy was accorded to the spouse in terms of entitlement to the estate, the parent-

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<sup>293</sup> Legal rights are sometimes described as a form of forced heirship.

<sup>294</sup> For further discussion see Chapter 6, 6.2.3.

<sup>295</sup> Family Law (Scotland) Act 2006, s.29 introduced a discretionary scheme that applies when an intestate leaves a surviving cohabitant.

child relationship remained the “core thread of fixity” in the context of inheritance. While Finch and Mason attributed this primarily to “flexible” kinship and choice,<sup>296</sup> the NatCen researchers placed greater emphasis on obligation and “the sense of responsibility to one’s partner and one’s descendants” that persisted despite “changes in social attitudes and cultural practices.”<sup>297</sup>

Additionally, while providing useful insight on kin relationships, the AHURI study and the Rowntree study provided particularly valuable information on attitudes towards assets, highlighting that housing is considered by many to be a source of pension funding and autonomy. However, as will be discussed in Chapter 4, this autonomy is perceived by some to be “threatened” by the spectre of paying for elder care. This in turn raises questions as to whether people have the right to maintain assets for a bequest and, if so, in what circumstances.

While my own findings were not quantitative, and therefore cannot provide any statistical information as to the prevalence of the views expressed, they are bolstered by the similarities they share with the more extensive English studies, in particular the NatCen study. They are also bolstered by the SLC’s own acknowledgement that both the 1986 survey and the 2005 survey showed “strong support” for children receiving a share of their parent’s estate,<sup>298</sup> a finding the SLC then largely disregarded.

Over the course of this thesis, the findings of my research will be analysed and situated against the backdrop of other studies to build a clearer picture of public attitudes to inheritance and family obligation, with a particular emphasis on how individuals chart these responsibilities in complex families. It will conclude that the contemporary understanding of family remains “rooted in partnership and parenthood” and, equally importantly, that this understanding is “grounded in love.”<sup>299</sup> As such, it will argue that there appears to be little justification to move towards a needs-based system that almost entirely obliterates the enduring parent-child relationship from the inheritance landscape.

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<sup>296</sup> Finch and Mason (2000),180-181.

<sup>297</sup> Douglas et al. (2011) at 271.

<sup>298</sup> 2009 Report at para 3.29.

<sup>299</sup> Douglas et al. (2011) at 271.

## Chapter 2: Methodology

### 2.1 Introduction

As discussed in Chapter 1, the SLC has commissioned two opinion surveys on succession law since 1986. Both were commissioned with a view to determining public opinion before issuing recommendations for reform. While they yielded some useful data, their potential was dulled by opportunities lost. In particular, the 2005 Survey failed to address succession issues flowing from the contemporary socio-demographic reality that has witnessed an increase both in the number of stepfamilies<sup>300</sup> and in serial monogamy.<sup>301</sup> In this, the 2005 Survey stands in stark contrast to the NatCen study<sup>302</sup> commissioned by the Law Commission of England and Wales as part of its reform process.<sup>303</sup>

The differences between the 2005 Survey and the NatCen study relate both to scope and to methodology. The NatCen study was clearly far more comprehensive, covering a broader base of issues.<sup>304</sup> Its breadth was attributable at least in part to a different approach to research design and methodology: not only did the NatCen study include both qualitative and quantitative elements, but it was conducted in partnership with academic subject experts. The resulting research findings were, unsurprisingly, far more targeted and nuanced than those generated by the 2005 Survey.

The 2005 Survey involved interviewing 1008 people,<sup>305</sup> while the NatCen researchers interviewed 1556 people.<sup>306</sup> Although the 2005 Survey interviewed a proportionately higher number of people, it is the absolute size of a sample, not its relative size, that is important and so the larger English sample is actually more precise for its particular

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<sup>300</sup> 2009 Report at para. 1.3.

<sup>301</sup> Duncan, S and Phillips, M, “New families? Tradition and change in partnering and relationships” in Park, A, Curtice, J, Thomson, K, Phillips, M, Johnson, MC and Clery, E (eds), *British Social Attitudes: the 24<sup>th</sup> Report* (Sage Publications, 2008), 11.

<sup>302</sup> NatCen study (2010).

<sup>303</sup> For an overview of the NatCen study, see Chapter 1 (1.4.2).

<sup>304</sup> In addition to considering first families and second families, the quantitative component of the NatCen study also addresses half-siblings and grandchildren. The qualitative component opened the discussion even further, examining, for example, reasons as to why people make wills and attitudes towards carers.

<sup>305</sup> 2009 Report at para. 1.4.

<sup>306</sup> NatCen study (2010), 8.

sample population.<sup>307</sup> Furthermore, the questions in the NatCen study contained more variables—and offered participants more options to choose from—than did those in the Scottish survey. This greater degree of nuance is important as it is precisely the lack of “detail in the questions” and “differentiation in the range of responses” that have led some to question whether the 2005 Survey offers a reliable gauge of public opinion.<sup>308</sup>

Perhaps the most important difference is that the NatCen study included a qualitative component, involving 30 in-depth interviews with people who had taken part in the omnibus survey. The questions in the qualitative component were not pre-set but were instead based on a topic guide to allow the questioning “to be responsive to the participants’ own contributions.”<sup>309</sup> As well as giving the participants the opportunity to reflect fully on their experiences in relation to the core themes, this also allowed them to broaden the scope of the debate, exploring unanticipated but connected questions.<sup>310</sup> Inspired by the success of this approach, and conscious that “some important questions”<sup>311</sup> remained unanswered in Scotland, I felt that further research could make a valuable contribution to the debate and for that reason designed and implemented my own study.

## 2.2 Research Design

Research design “provides a framework for the collection and analysis of data” and, in turn, the choice of research design reflects the importance attached to the various dimensions of the research project.<sup>312</sup> Not all research projects can be neatly pigeon-holed into a specific category but, as I was interested in “patterns of association”<sup>313</sup> and “understanding behaviour in a specific social context,”<sup>314</sup> key features of cross-

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<sup>307</sup> Bryman, A. *Social Research Methods* (3<sup>rd</sup> edition, Oxford University Press, 2008), 179.

<sup>308</sup> Reid (2008) at 407.

<sup>309</sup> NatCen study (2010), 128.

<sup>310</sup> In the case of the NatCen qualitative study, participants raised questions related both to stepchildren and to spouses who had been parties to very short marriages. In the qualitative component of the AHURI study (see Ch 1, 1.4.4) participants spontaneously discussed the right to die, and in my own project participants raised both the right to die and the question of responsibility towards former sons- or daughters-in-law.

<sup>311</sup> Reid (2008) at 404.

<sup>312</sup> Bryman (2008), 31.

<sup>313</sup> *Ibid*, 44.

<sup>314</sup> *Ibid*, 31.

sectional and case study design respectively,<sup>315</sup> my approach anchored me firmly in these two frameworks.

Bryman defines cross-sectional research design as follows:<sup>316</sup>

A cross-sectional design entails the collection of data on more than one case (usually quite a lot more than one) and at a single point in time in order to collect a body of quantitative or quantifiable data in connection with two or more variables (usually many more than two), which are then examined to detect patterns of association.

While cross-sectional design is most commonly associated with quantitative research, it has its place in the qualitative methodologies I planned on using. In keeping with Bryman's definition, I planned to interview quite a large number of people at a single point in time and, by asking people to consider their past and current behaviour (who they had provided for in their will, who they would provide for etc.), as well as their current views on a range of issues, I would attempt to investigate "patterns of association."<sup>317</sup> Finally, although my study remains firmly qualitative in nature, there were elements that were quantifiable insofar as all participants were asked whether they agreed with a small number of central propositions. However, while the figures provide "an indication of preferences,"<sup>318</sup> as with all qualitative research, they cannot be interpreted to be statistically representative.

For its part, case study design entails "the detailed and intensive analysis of a single case,"<sup>319</sup> although a case can be a single community as opposed to an individual. To a degree, Scotland could be considered a "case": I was interested in Scotland as a "specific social context" and the fieldwork was undertaken in a single location insofar as it was undertaken in Scotland. However, to my mind, Scotland is not really "a focus of interest in its own right"<sup>320</sup>—that is to say my primary focus was not understanding Scottishness—and the case study design more properly came into play

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<sup>315</sup> *Ibid*, 44 and 31 respectively.

<sup>316</sup> *Ibid*, 44.

<sup>317</sup> *Ibid*.

<sup>318</sup> Hewitson, B, Seale, B and Joyce, L, *Public Engagement Exploring Care and Support Funding Options: TNS-BRMB Report of Findings*, (BMRB Ltd, 2011), 6.

<sup>319</sup> Bryman (2008), 52.

<sup>320</sup> *Ibid*, 53.

in the last wave of interviews where there was a focus on stepfamilies and first families/second families as a “specific social context.”<sup>321</sup>

### 2.3 Research Methodology

Having decided on the framework for the collection and analysis of data, I then had to determine which methodologies to use to gather the data. Based on the literature review, I had an interest in qualitative methods, but wanted to consider the merits of quantitative and mixed methods research before making a final decision. As aforementioned,<sup>322</sup> two quantitative attitudinal studies have been carried out on inheritance in Scotland in recent years. The one most directly related to the SLC’s proposed reforms was the 2005 Survey. The Scottish Government explains an omnibus survey in the following terms:<sup>323</sup>

An omnibus survey is a survey that is carried out at regular intervals (usually weekly or monthly) and allows a range of clients to buy questionnaire space. Subscribers to an omnibus survey buy in on the basis of how many questions are to be asked of the sample, and the type of questions.

While omnibus surveys undoubtedly offer advantages in terms of cost-effectiveness and fast results, they are also associated with a number of shortcomings. Most notably, perhaps, the Scottish Government feels they are unsuitable for “complex questions,” instead requiring questions to be “simple, unambiguous and self-explanatory.”<sup>324</sup> As such, they are considered ideal for questions of “immediate policy interest” and for “question testing and piloting.”<sup>325</sup> This makes the omnibus survey an unusual choice on which to base policy reform—at least where no supplementary research is conducted—and one which suffers in comparison to the more substantive work carried out in England and Wales.

Of course, not all omnibus surveys are formulated in the same way and, as the NatCen study clearly demonstrated, they can also be used to elicit more nuanced responses. However, even when detailed, carefully planned questions are asked, the survey

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<sup>321</sup> *Ibid.*, 31.

<sup>322</sup> Chapter 1, 1.3.2 and 1.3.3.

<sup>323</sup> Scottish Government Social Research Group, *Guide 2: Omnibus Surveys*, Social Science Methods Series, available at <http://www.gov.scot/Resource/Doc/175356/0114841.pdf>.

<sup>324</sup> *Ibid.*, 2.

<sup>325</sup> *Ibid.*

format commonly used in quantitative research is not the ideal means to explore adequately the interplay between attitudes to inheritance and attitudes to family—and family financial responsibility—particularly within complex families. Furthermore, as existing quantitative work had already provided some valuable insights into potential areas of conflict, complementary qualitative work to further examine potential flash points—as opposed to more quantitative work confirming the flash points—seemed likely to generate more valuable research findings. Finally, as my primary intention was not so much to *quantify* numbers of people who purported to hold a certain belief as to explore the *range* of attitudes that existed, qualitative research was an obvious choice.

Qualitative research can be carried out using a range of methodologies of which the interview is the most commonly employed.<sup>326</sup> In turn, interviews can be carried out in numerous ways, one of which is the focus group, which I decided to use to gather most of the data. As the term focus group is widely used in both academic literature and common parlance it is, in the interests of clarity, worth beginning with a definition of the term. Bryman defines a focus group in the following terms:<sup>327</sup>

The focus group method is a form of group interview in which: there are several participants (in addition to the moderator/facilitator); there is an emphasis in the questioning on a particular fairly tightly defined topic; and the accent is upon interaction within the group and the joint construction of meaning.

The idea of group interaction was considered important as it was anticipated that people were likely initially to perceive inheritance in fairly black and white terms. I hoped that the presence of other views and perspectives would both open up more nuanced dialogue and provide an indication of what were considered socially acceptable views. Focus groups, as opposed to a lengthy series of individual interviews, also offered a relatively time-efficient means of meeting with a large number of people with a view to identifying those whose narratives were most relevant to this thesis.

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<sup>326</sup> Bryman (2008), 436.

<sup>327</sup> *Ibid*, 474.

Despite the obvious benefits of focus groups, I also planned to conduct a small number of interviews in the course of the project. These interviews were conducted with a view to gathering further information (including expert opinion) and exploring emerging theories. As group interaction was to be recorded in the focus groups, the goal in the individual interviews was to record a detailed account of particular experiences. In the case of the individuals selected from the focus groups, it was hoped that the participants would be willing to share information that they had perhaps held back in a group setting.

## 2.4 Target group

Once I had decided to proceed with a combination of focus groups and interviews, I next had to identify the target demographic. As this study was to be carried out by one researcher as part of a PhD thesis—and could not, therefore, hope to be as exhaustive as the Rowntree<sup>328</sup> and NatCen studies—it was very important to focus on interviewing people whose life experiences would likely resonate with the questions at stake. In other words, resources were not available to interview those who *might* have had relevant experiences but who were, at first blush, less likely to have had such experiences.

The life experiences that are of particular interest to this study are, in no particular order: having received an inheritance; having written a will; having re-partnered; having had children; having provided for adult children; having owned property; having looked after elderly parents and having planned for retirement. Recent studies suggest that that only 4% of those aged between 16 and 24, and 14% of those aged between 25 and 34 have a will;<sup>329</sup> that those under 30 are the least likely to have received an inheritance;<sup>330</sup> that the average ages at which Scottish men and women become parents are 32.7 and 30.1 respectively;<sup>331</sup> and, that the average age of first-time buyers in Scotland is 30.<sup>332</sup> In addition, it was assumed that those under 30 were

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<sup>328</sup> Rowlingson and McKay (2005). For an overview see Ch 1, 1.4.3.

<sup>329</sup> O'Neill (2006), 6.

<sup>330</sup> Rowlingson and McKay (2005), 19.

<sup>331</sup> National Records of Scotland, *Scotland's Population: Annual Review of Demographic Trends 2014*, 6, available at <https://www.nrscotland.gov.uk/files//statistics/rgar2014/rgar-14-corrected.pdf>.

<sup>332</sup> In 2013, the Council of Mortgage lenders found that the average age of a first-time buyer in the UK was 29 (Council of Mortgage Lenders, *First-time Buyers: The Story Behind the Numbers*, available at <https://www.cml.org.uk/news/news-and-views/546/>). Figures for Scotland were reportedly slightly

less likely to have provided for adult children, looked after elderly parents or planned for retirement. It was therefore decided to exclude people under 30 from the study and focus efforts and resources on those who were most likely to have encountered, or at least contemplated, these issues.

Although the focus on middle-aged and older people mirrors the approach used in the Rowntree study,<sup>333</sup> this decision was not made lightly, as it does not follow that those who have not personally encountered a given situation have nothing to contribute to a discussion on it. In particular, excluding this age group excluded the experiences of younger people whose parents had remarried. However, my concerns were largely allayed by the fact that those who were living in their thirties or forties as children of divorced parents may also have been children of divorced parents in their teens and twenties. Furthermore, it was also anticipated that, while age may be a factor in individuals' attitudes to their parents' re-partnering, attitudes may also change over the course of the parent or parents' second relationship. In other words, the age of the adult child was very unlikely to be the sole factor in explaining attitudes or beliefs. Finally, as there was no reason to assume that adult children in their twenties were any more likely to have recently divorced parents than adult children in their thirties, there was no compelling reason to include younger adults.

A second persuasive reason to focus on an older population was that the SLC's study was fairly heavily weighted towards a younger population: 163 of the 1008 (16%) of those surveyed by MRUK were aged between 16 and 24 while 232 (23%) were aged between 25 and 34.<sup>334</sup> This means that 395, or 39%, were aged under 35. While this is not necessarily problematic, it is noteworthy that the 16-24 age group was often cited as being slightly out of step with the prevailing view,<sup>335</sup> something certain commentators plausibly attribute to views changing over the course of the lifecycle.<sup>336</sup> If indeed views do change over our life course, it makes sense to give particular consideration to the views expressed by people as they reach an age where they are

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higher: Bain, S, "Levels of first time buyers at highest for years", *The Herald*, 19 January 2013, available at <http://www.heraldscotland.com/business/personal-finance/levels-of-first-time-buyers-at-highest-for-years.19946483>.

<sup>333</sup> Rowlingson and McKay (2005), 82.

<sup>334</sup> 2005 Survey at para 1.10.

<sup>335</sup> *Ibid*, for example, at paras 2.15, 2.18, 2.22.

<sup>336</sup> Rowlingson and McKay (2005), 42.

actually making decisions, based on these views, that are likely to have long-term consequences: at 35 people may theoretically consider one day transferring ownership of the family home to their children, at 65 they are more likely to actually do so.

## 2.5 Recruitment

### 2.5.1 Recruitment: phase 1

It was anticipated that recruitment of subjects would not be without difficulty, as I had to ask participants to sacrifice between an hour and an hour and a half of their time (plus travel time) in exchange for nothing more than a cup of coffee. Although a small qualitative study could never hope to be representative of the population, I did strive to recruit people with different backgrounds and life experiences. In particular, given that inheritance can be perceived as an elitist topic, I was keen to involve participants from a lower socio-economic background. While the 2005 Survey, the Scottish Consumer Council survey and the NatCen study all use a variant of the NRS social grade system,<sup>337</sup> which provides some insight into the socio-economic background of participants, this option was not available to me. I did not have the resources to study the stratification of the Scottish population and, due to time constraints and people's sensibilities, I did not feel it was appropriate to ask a full gamut of questions to enable me to attempt to attribute a socio-economic category to each participant.

Nevertheless, the biographical questionnaire that was distributed did contain two questions that allowed me to gain some limited insight into the participants' economic status.<sup>338</sup> Based on the information gathered from the first six groups, I felt that I needed to focus more on groups with a lower socio-economic status, and so I approached a group that I believed matched this criterion and asked them to participate.

In an effort to attract a general cross-section of people, I initially tried to recruit strangers. I attempted to do this by posting advertisements in three local supermarkets—each reputed to target a different demographic—and a hospital. I also requested permission to post a recruitment advertisement in a local bowling club but

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<sup>337</sup> The NRS Social Grade System is a classification system based on occupation, see <http://www.nrs.co.uk/nrs-print/lifestyle-and-classification-data/social-grade/>.

<sup>338</sup> The biographical questionnaire and an overview of the findings it generated are included in Appendix 2.

this was denied. This approach yielded absolutely no response and I therefore began to recruit using a form of snowball sampling: I made contact with a small number of individuals relevant to the research topic and used them to establish contact with others.<sup>339</sup> Given that inheritance is an issue that will affect us all, it was not difficult to select individuals relevant to the research topic and, as mentioned above, my only restrictions were that they were Scottish<sup>340</sup> and aged over 30.

It was determined that between 30 and 35 people would be a useful—and realistic—number of subjects and, to this end, I aimed for six focus groups of approximately six people.<sup>341</sup> This number reflected both practical considerations, such as the limited resources of a doctoral project, and content-driven considerations, such as the point at which little new information is generated.<sup>342</sup> In the end, I ran seven focus groups: group one comprised four people; group two comprised four people; group three comprised six people; group four comprised five people; group five comprised three people; group six comprised two people and group seven comprised seven people. This provided a total of 31 people. I did not seek to set up any further focus groups at this point as I felt that, borrowing Glaser and Strauss' concept,<sup>343</sup> theoretical saturation had been reached. No group was intended to have only two or three participants and the small groups all reflect last minute cancellations. However, on balance, the small groups proved every bit as fruitful as the larger groups, confirming the view that smaller groups are appropriate where the topics are controversial or complex and the aim is to glean personal accounts.<sup>344</sup>

I also approached the recruitment process with the view that it would be preferable that the participants were not known to one another. I anticipated that people would be reticent both to talk about financial vulnerability and to reveal family tensions that could cast them, the narrator, in a poor light, and I expected that this hesitation would be heightened where the parties were known to each other. To my surprise, however,

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<sup>339</sup> Bryman (2008), 184.

<sup>340</sup> Participants who self-identified as Scottish were accepted as Scottish and no objective criteria had to be satisfied.

<sup>341</sup> Gray observed that typically focus groups comprise between six and eight participants (Gray, DE, *Doing Research in the Real World* (3<sup>rd</sup> edition, Sage, 2013), Ch 18.

<sup>342</sup> See discussion at 2.9 below.

<sup>343</sup> Discussed in Bryman (2008), 416.

<sup>344</sup> *Ibid.*

the opposite proved to be true, with the least successful focus group being made up of participants who were strangers or mere acquaintances. That said, both the formal location of that meeting, a university reception room, as opposed to the cafes and living rooms where other meetings were held, and the fact that one of the participants was a law professor, may have been contributing factors. Nonetheless, where natural groupings occurred, participants did appear to be particularly forthcoming.

### 2.5.2 Recruitment: phase 2

From the outset, I planned to ask two or three participants to partake in follow-up interviews if I felt their personal experiences particularly resonated with the research questions. In the end, three were selected on this basis: one was remarried with both children and stepchildren, and also had both of her parents in a care home; one was a stepchild with several experiences of inheritance who had also cared for an elderly relative; and one was a father of young children. The father had no particular experience of inheritance but I included him for two reasons: firstly, although mothers of young children emerged as particularly strong proponents of affording a share of the estate to the children, I had virtually no data from fathers of young children; and, secondly, in his focus group, he voiced a view that was somewhat silenced by two very dominant voices espousing an alternative view.

In addition, I completed four face-to-face interviews with participants who had not participated in focus groups. One of these was with an individual who had had to withdraw from a focus group at the last minute and who offered to be interviewed at another time, and the remaining three were with participants I sought out to boost certain categories. The reason that I did so was to develop an emerging theory relating to stepfamilies. This is an example of what Glaser and Strauss term theoretical sampling,<sup>345</sup> a key component of grounded theory (discussed at 2.9 below). This is defined as “the process of data collection for generating theory whereby the analyst jointly collects, codes and analyzes his data and decides what data to collect next...in order to develop his theory as it emerges.”<sup>346</sup> As the emerging theory pertained to the particular behaviour of stepfamilies, I sought out three people who could be defined

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<sup>345</sup> Glaser, BG, and Strauss, AL, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Publishing Company, 1967), 45.

<sup>346</sup> *Ibid*, discussed in Bryman (2008), 415.

as belonging to such: one was an individual who is still involved in a protracted inheritance dispute and who is also a stepchild; one was a divorced and re-partnered parent from a low socio-economic background; and one was a re-partnered widow with children from a previous marriage and a keen interest in the subject.

### 2.5.3 Recruitment: phase 3

Finally, at the end of the study, I interviewed two experts in the field of succession, chosen in consultation with my PhD supervisors. The first, Professor George Gretton (University of Edinburgh) was approached as he was a Law Commissioner at the SLC at the time the 2009 Report was published. The interview was conducted with a view both to discussing some of my research findings and to gaining further insight into the rationale underpinning the SLC's recommendations. The second, Eilidh Scobbie, is an experienced practitioner in contentious executry estates and was approached with a view to gaining better insight into how complex families handle inheritance.

## 2.6 Ethical considerations

The subject matter at issue in the research project inevitably gave rise to certain ethical concerns. It was clear that the discussion would revolve around sensitive subjects, namely family, money and death. The project was subject to the approval of the Ethics Committee for non-clinical research involving human subjects (University of Glasgow, College of Social Sciences) and, in the course of the approval application process, a number of strategies were developed to mitigate the risk of harm to subjects.<sup>347</sup>

Firstly, participants were made aware of topics that were likely to arise before they agreed to participate. This was achieved through the Plain Language Statement which was sent to participants alongside (or immediately after) the invitation to join the study. The Plain Language Statement set out the purpose of the study and explained to participants how they could expect the group discussion to unfold. This meant that those who felt they might be ill-at-ease in the discussion could simply decline to

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<sup>347</sup> The risk primarily related to emotional harm. The physical risk to participants (for example, violence from fellow participants) was deemed to be negligible. Similarly, the risk to me as an interviewer was negligible although the standard safeguards were implemented: meetings were conducted, where possible, in public places and family members were made aware of my whereabouts.

participate. Apprising focus group members of the subject matter offered the added advantage of allowing participants to be prepared for the discussion. This contributes to what Hewitson et al. term a “deliberative approach,” which allows discussions to be informed and “outputs well thought-out and considered.”<sup>348</sup>

Secondly, participants were given the opportunity to withdraw at any point in the process, without being asked to explain their decision. Participants were informed of this option both in writing through the Plain Language Statement and orally before the discussion group commenced its work. Participants were also assured that they were free to participate to whatever extent they chose, and could simply opt to listen rather than to participate actively. Additionally, in the small number of cases where the participants were relatively recently bereaved (or seemed likely to be imminently bereaved), they were reminded of the option not to answer questions on more than one occasion during the course of the discussion.

Finally, steps were also taken to maintain confidentiality. Participants were asked to respect each other’s confidentiality by not disclosing confidences. In other words, while participants were obviously free to discuss the topics that arose in the discussion group, they were asked not to attribute comments to particular individuals. Furthermore, the participants’ right to anonymity is respected in the thesis (and any related publications) by the use of pseudonyms. It was explained to expert interviewees that, while they could choose to be identified by a pseudonym, the disclosure of their professional role<sup>349</sup> could still result in their identity being revealed. Both expert interviewees agreed to be named. All participants were asked to sign a consent form indicating that they understood this process.

While the most obvious form of harm was emotional distress, having conducted a thorough literature review—and whilst obviously careful to exercise caution—it was quite obvious that participants generally found the prospect of their own death relatively unproblematic. Death featured in the conversations as an inevitability, but a very distant one. Indeed, in my own study, when one of the oldest participants was asked to reflect on her potential care needs, she interpreted the question as referring to

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<sup>348</sup> Hewitson et al. (2011), 6.

<sup>349</sup> This was felt to be necessary to illustrate the expertise the individual possessed.

her very elderly parents' needs, seemingly incapable of considering herself as part of the relevant demographic. Nonetheless, the discussion must have prompted the participants to engage, at least fleetingly, with the prospect of their own demise; however, if they did so, it was with phlegm and humour and very little evidence of angst.

The more emotive topics were families and kin relationships, but as this was exactly where Scotland had a real shortage of data, it was decided that the potential benefits outweighed the risks. Many of the participants chose to reveal moving stories of family conflict and they did so with candour and self-awareness. In general, debate and discussion were approached with enthusiasm and great interest.

A final, unanticipated ethical consideration was that, on at least two subjects, the participants appeared to look to me for legal advice. An unexpected finding of the study was that many participants did not appreciate that, in leaving their estate to their spouse, they had no guarantee in law that their spouse would eventually pass it on to their children. As the participants came to the realisation that this was the case (or at least it was extremely likely that this was the case) several appeared anxious. The suggestion that anyone with concerns should ask their lawyer for clarification did little to assuage their unease; the participants clearly wanted clarification of the terms of their wills as quickly as possible. While I found this unsettling, in the vast majority of cases, the participants understood that I was not there in the capacity as a legal advisor and happily continued with the discussion. On reflection, I am confident that this could not have been handled differently, particularly as any comments would be purely speculative as none of them had their wills to hand.

On the second matter, however, the Plain Language Statement could have been improved. A sizeable group of elderly men, ostensibly from a poor socio-economic background, volunteered to participate in the study. Within moments of the discussion group beginning, it became clear that they hoped to gain succession planning advice with a view to "protecting" the family home from being used to fund their old-age care. Given the demographic of the group was known ahead of time, it may have been wise to state explicitly in the Plain Language Statement that the discussion group was

not an information or advice session. Consideration will be given to this and similar questions in any future projects.

## 2.7 Biographical questionnaire

Participants were asked to fill out a short self-completion biographical questionnaire at the beginning of the focus group, as it was anticipated that views would be affected by socio-demographic factors such as age, gender, class, housing tenure, relationship status and the presence of children. In addition, it provided an ideal opportunity to record whether participants had made a will. While the temptation to issue a lengthy questionnaire was large, I wanted something that could be completed in less than five minutes so as not to further encroach on participants' time. Beyond age and gender, the 12-question questionnaire sought to determine whether the participants had a will; whether they were married; whether they were in their first or second relationship; and, whether they had children. It also sought to garner a little information about their socio-economic status.

Gathering information on socio-economic status was important, as has been discussed, as inheritance is often viewed as being the exclusive purview of the very wealthy. One potential interviewee, for example, turned down the request to participate as she felt that the subject matter did not, in her words, concern "people like me." Indeed, even amongst those who had inherited, there was a general sense that "proper" inheritance was exclusively the realm of the one-percenters.<sup>350</sup> For example, even amongst those who had inherited substantial amounts there was no sense that they believed themselves to be a privileged elite; this was always a term better reserved for others. By gathering socio-economic data, I hoped to illustrate that interest in—and often passionate interest in—inheritance was not merely the domain of the very wealthy.

A second reason for attempting to collect this information was that attitudes were expected to vary according to socio-economic status: certainly, the 2005 Survey

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<sup>350</sup> The term one percenters is a term specifically used to refer to those in the top income percentile, although it is also used as an umbrella term for the very wealthy. See for example Mankiw, N, "Defending the One Percent" (2013) 27 *Journal Of Economic Perspectives* 21.

found attitudes expressed by those in social group AB differed from those in other groups on several occasions.<sup>351</sup> However, it must be noted that I was only able to gather economic data based on income and property ownership, and did not fully explore other factors relating to social status. It might be expected that income levels give an indication of socio-economic status, and its close cousin class, but it is not necessarily clear that this is the case. Indeed, as has been observed, “in today’s landscape...white collars are often frayed and many blue collars have designer labels.”<sup>352</sup> That is not to suggest that there is no correlation between income and socio-economic class, but rather to underscore that other factors are at play. Regardless, my qualitative study did not use a comparable classification system to that used in the large-scale quantitative studies and no conclusions can be drawn about the beliefs of particular socio-economic groups based on this study. Nonetheless, the data gathered did prove valuable and correlations were noted between relative wealth and certain attitudes with regard to some questions.

It should also be noted that, while the questionnaire did not specifically refer to class, a number of participants spontaneously identified themselves as working class or middle class in the course of the focus groups. While any discussion of class is inevitably fraught with difficulty, not least because we cannot clearly define what is meant by “working class” or “middle class,” certain views were shared by those who identified as belonging to a particular social class. The 2005 Survey,<sup>353</sup> as well as the Scottish Consumer Council survey,<sup>354</sup> understandably used objective classification but, according to a YouGov survey, there is often a “huge mismatch” between people’s “objective” social class and how they define themselves.<sup>355</sup> It would be interesting to explore whether there is any closer correlation between self-classified social class (as an expression of a political ethos and belief system) and attitudes to inheritance than there is between objective social classification and attitudes to

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<sup>351</sup> See for example 2005 Survey at para 2.15 or para 2.21.

<sup>352</sup> Kellner, P, “Britain’s middle-class meritocracy” (YouGov UK, 2013), available at <https://yougov.co.uk/news/2013/06/24/britains-middle-class-meritocracy/>.

<sup>353</sup> The definitions of the socio-economic groupings used in the 2005 Survey are found in the footnote to table 1.1 of para 1.10.

<sup>354</sup> The classification system used by the Scottish Consumer Council is shown, although not fully explained in O’Neill (2006), 7.

<sup>355</sup> Kellner (2013).

inheritance. Such a question, while worthy of future research, remains beyond the scope of this thesis.

The final reason for gathering socio-economic data was to gain an understanding as to whether those who planned to bequeath money to friends and family were actually in a position to do so, or whether their comments simply reflected their dreams and aspirations. With this in mind, I asked participants both how much their home was worth and how much they owed on their mortgage. This was based on the assumption that, for most people, their house will be their most significant asset. I also asked how much people earned. These questions generated some helpful information but could only ever paint a partial picture. One participant, for example, with reference to the question about home ownership, asked for clarification as to whether I was referring only to the primary home or whether I also wished a note of other assets; with hindsight, I do not think that she would have been the only one to own more than one property. A second participant, with a comparatively modest home, reported (unprompted) more than £100,000 in savings. Finally, those who were retired reported relatively low incomes but were perhaps in a different position from somebody on a similar income with a large mortgage.

In summary, the socio-economic data generated certainly showed that inheritance was a subject relevant to those from different economic backgrounds. While the sample did not include people living in the most abject poverty, it did include a cross-section of people with different life experiences and levels of wealth. However, it is again worth reiterating that the purposive nature of the recruitment means that the research cannot provide any statistical information relating to the prevalence of particular views, experiences or reflections in the general population,<sup>356</sup> or indeed within particular social groups. As Hewitson et al. explain, “any attempt to provide numerical evidence of this kind would require a quantitative research methodology.”<sup>357</sup>

## 2.8 Pilot study

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<sup>356</sup> Hewitson et al. (2009), 6.

<sup>357</sup> *Ibid.*

The research project was preceded by a pilot study to test the questions and scenarios. I wanted to ensure both that the scenarios were easy to follow and that they would generate discussion. I also wanted to see whether the participants would be open to answering the more personal questions, both in discussion and in the questionnaire. Finally, I wanted to ensure that there would be sufficient time to address all of the topics that I hoped to cover. The pilot study comprised two participants who were interviewed separately.

The pilot study was broadly successful in that both participants were willing and able to engage with the themes. Furthermore, I had no sense that participants were withholding information or reluctant to talk about personal matters. I did however find that, as expected, I had too many scenarios and, after two or three, participants needed a break from processing the information. I had initially planned scenarios with a degree of overlap in the hope that this would elicit further, more nuanced responses but, in reality, the participants were very forthright and virtually exhausted each subject as it was raised. This meant that subsequent scenarios on closely related subjects added little of value.<sup>358</sup> Finally, I noted that one of the participants appeared at times to feel slightly intimidated by the questions, commenting frequently that she was not sure if she was giving me the “right” answer.

As a result of the pilot study, I reduced the number of scenarios that I aimed to ask each group from five to two or three and tried to increase the level of reassurance I provided about there being no “right” answer.

A separate pilot study was also conducted with a solicitor from a medium-sized non-specialist law firm with a view to testing questions on how couples sought to protect their spouses and children. The interviewee responded well to the questions and no significant issues were uncovered.

## 2.9 Analysis

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<sup>358</sup> However, I did add one scenario (scenario 4) to specifically test views where a couple had agreed that the survivor would pass on to their children as this quickly emerged as an important topic.

The focus groups and interviews were all recorded and then transcribed verbatim, ready to be analysed.<sup>359</sup> Although qualitative data analysis is not governed by the same clear-cut rules that guide quantitative data analysis, some general frameworks have been developed, of which the most widely used is grounded theory.<sup>360</sup> Grounded theory has evolved considerably since it was first advanced by Glaser and Strauss in the 1960s,<sup>361</sup> to the extent that there is now considerable controversy surrounding what it is and what it entails.<sup>362</sup> This thesis is not the place for an exhaustive consideration of the polemic surrounding the subject and instead, I will adhere to Strauss and Corbin's widely-accepted definition that holds grounded theory to be "a general methodology for developing theory that is grounded in data systematically gathered and analysed."<sup>363</sup>

Although Bryman contends that grounded theory is now the most widely used framework for analysing qualitative data, he does add the caveat that some believe it is "honoured more in the breach than in the observance."<sup>364</sup> By this he means that claims are often made that grounded theory has been used when in fact it has not. This may be because the "complexity and vagueness" of grounded theory discourages researchers from fully adopting it as an analytical approach.<sup>365</sup> With this in mind, I focused my attention not on the nuances of the competing definitions of grounded theory but on what Bryman identifies as the *tools* of grounded theory<sup>366</sup> to ensure that I was remaining faithful to the approach.

Central to grounded theory is the notion of coding. Coding refers to "the development of concepts and categories and to the assignment of corresponding codes to the data."<sup>367</sup> The term "code" refers to the word or short phrase that denotes a particular

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<sup>359</sup> An attempt has been made to reflect the precise register and Scots pronunciation of the Group 7 participants to reflect their unique voice.

<sup>360</sup> Bryman (2008), 541.

<sup>361</sup> Glaser and Straus, (1967).

<sup>362</sup> Bryman (2008), 541.

<sup>363</sup> Strauss, AL and Corbin, J, "Grounded theory methodology: an overview" in Denzin, NK and Lincoln, YS, (eds), *Handbook of Qualitative Research* (SAGE Publications, 1994), 273.

<sup>364</sup> Bryman (2008), 541.

<sup>365</sup> Peters, I. "Too Abstract to be Feasible? Applying the Grounded Theory Method in Social Movement Research" *GIGA Working Papers*, No. 247, May 2014, 5.

<sup>366</sup> Bryman (2008), 542

<sup>367</sup> Peters (2014), 16.

idea.<sup>368</sup> The analysis begins with this piece of data and then progresses up the “conceptual ladder.”<sup>369</sup> Thus, low-level concepts are built on data and then, in turn, form the basis for higher-level categories.<sup>370</sup> For example, on rereading my transcripts and the data ascribed to each code, I noted that many participants regarded “passing on” to be part of parenting and, in particular, parental obligation. This then became a core category and I reread existing transcripts in that light to develop it further. I also explored this particular category further by conducting a supplementary interview.

The codes are not, however, fixed, as they often are in quantitative data analysis, but rather in “a constant state of potential revision and fluidity.”<sup>371</sup> This is because the data and the theory are in constant dialogue or, as Charmaz put it, the researcher’s interpretation of data shape his or her emergent codes in grounded theory.<sup>372</sup> As the concepts become broader they “gain explanatory value”<sup>373</sup> but lose specificity; the challenge lies in ensuring that the theory remains “grounded” while also moving away from the empirical material to a sufficient degree so as to avoid “mere reproduction.”<sup>374</sup>

In approaching my own data, I undertook a form of what Charmaz terms “initial coding” (or open coding)<sup>375</sup> whereby I noted a great number of codes in the margins of my transcripts. I did this, as recommended by other researchers, by advancing line by line through the transcript, asking myself questions about the meaning of what was being said.<sup>376</sup> I then moved on to “focused coding” (or selective coding), which emphasizes “the most common codes and those that are seen as most revealing about the data.”<sup>377</sup> I did this by selecting approximately six thematic codes and ascribing a colour to each code. I added to these codes as the project developed and strong sub-

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<sup>368</sup> *Ibid.*

<sup>369</sup> *Ibid.*

<sup>370</sup> *Ibid.*

<sup>371</sup> Bryman (2008), 542.

<sup>372</sup> Charmaz, K, “Grounded Theory: Objective and Constructivist Methods” in Denzin, KN, and Lincoln, YS (eds), *Handbook of Qualitative Research* (Sage, 2000) in *ibid.*

<sup>373</sup> Peters (2014), 16.

<sup>374</sup> *Ibid.*

<sup>375</sup> Bryman provides an overview of the different taxonomies of coding in his introduction to coding in grounded theory. Strauss and Corbin identify three types of coding, the first of which is open coding, whereas Charmaz distinguishes between two types of coding, the first of which is initial coding (Charmaz, K. *Constructing Grounded Theory*, (2<sup>nd</sup> edition, Sage, 2014), 109) For a comprehensive overview, see Bryman (2008), 543. See also Peters (2014), 17.

<sup>376</sup> Peters (2014), 17.

<sup>377</sup> Bryman (2008), 543.

themes emerged, and ultimately assigned ten thematic codes.<sup>378</sup> The process of selective coding allows for the identification of “core categories” which are central in “integrating, densifying, and saturating the theory.”<sup>379</sup> An example of a core category in the research findings was tension between first families and second families. I was then able to analyse its relationship to other categories, such as parental obligation through a process of constant comparison.

A second tool of grounded theory is theoretical sampling whereby “theory evolves during actual research ... through continuous interplay between analysis and data collection.”<sup>380</sup> In my own research, while a claim of continuous interplay may be a stretch, I found that I recruited for my focus groups and interviews in two or three waves as I began to see particular patterns and associations emerge from the data. This moderated form of theoretical sampling is not atypical and Strauss and Corbin themselves recognised that “the ideal practice of theoretical sampling is often unfeasible”<sup>381</sup> due to research constraints.

A third, related tool identified by Bryman is theoretical saturation. Practitioners of grounded theory carry on collecting data until they achieve theoretical saturation, meaning that “successive interviews have both formed the basis for the creation of a category and confirmed its importance” so that there is no longer a need to continue with data collection on that front.<sup>382</sup> While theoretical saturation was reached quite early in relation to some categories (half-siblings, long-term care funding) more data would be beneficial in other areas and avenues of further exploration are still open.

The final tool identified by Bryman is “constant comparison” which involves “maintaining a close connection between data and conceptualization, so that correspondence between concepts and categories with their indicators is not lost.”<sup>383</sup> Strauss and Corbin argued that it is the making of constant comparisons that produces

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<sup>378</sup> A table of the 10 thematic codes and some examples of the initial codes underpinning them is included in Appendix 3. Only three or four examples of initial codes are given for each thematic code due to space constraints.

<sup>379</sup> Peters (2014), 18.

<sup>380</sup> Strauss and Corbin (1994), 273.

<sup>381</sup> Strauss and Corbin discussed in Peters (2014), 11.

<sup>382</sup> Bryman (2008), 416.

<sup>383</sup> *Ibid*, 542.

“conceptually rich theory”<sup>384</sup> as opposed to a mere string of discrete codes. Unlike Glaser and Strauss’ original approach, which “called upon researcher to ignore their theoretical knowledge,” Strauss and Corbin’s approach credits the researcher with the expertise to look for themes that coincide with previous knowledge.<sup>385</sup> It is argued that “referring to existing literature throughout the research process contributes to a better understanding of one’s own empirical work.”<sup>386</sup> This is the approach that is followed in this thesis and, to mitigate any bias, “sensitising concepts”<sup>387</sup> were developed. Sensitizing concepts allow the researcher to identify potential points of bias and to ensure that the analysis gives them due consideration. For example, theoretical knowledge and anecdotal evidence influenced both my decision to examine tension between first families and second families and my interpretation of the data. Consequently, I approached the hypothesis that tension is rife between first families and second families “not as an assumption but as a sensitising concept”<sup>388</sup> to allow me to analyse it in detail and revise if necessary.

In summary, Strauss and Corbin use grounded theory as a means of generating theory. Coding produces concepts, the labels given to discrete phenomena, which in turn become the “building blocks of theory.”<sup>389</sup> Theory is developed by identifying potential relationships amongst concepts and sets of concepts to create “systematic statements of plausible relationships.”<sup>390</sup> The remainder of this thesis will discuss the theories developed through analysis of the data generated by my research project.

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<sup>384</sup> Strauss and Corbin (1994), 277.

<sup>385</sup> Peters (2014), 6.

<sup>386</sup> *Ibid*, 14

<sup>387</sup> *Ibid*.

<sup>388</sup> *Ibid*, 15.

<sup>389</sup> Peters (2014), 7.

<sup>390</sup> Strauss and Corbin (1994), 279.

## Chapter 3: A historical overview of family relationships

### 3.1 Introduction

The next four chapters will focus on the parent-child relationship in the context of succession law. In order to understand why the relationship has always been privileged in the Scots law of succession, this short chapter will, by way of introduction, examine both the purpose of the law of succession and the historical origins of the law of parent and child. In addition, given that the succession rights of children are intimately linked to the succession rights of spouses,<sup>391</sup> consideration will also be given to the historical origins of the law of husband and wife.

Beyond providing historical context, this chapter will specifically seek to address the nature and extent of the legal obligations that existed between parents and their children and will ask what function they served. Chapters four to seven will then consider how these obligations differ, morally and legally, in contemporary Scotland. The nature of contemporary family obligations will be analysed through a detailed examination of the data from my research study and the contextualisation of those findings in relation to other significant studies. Following this examination, I will argue that normative obligations between parents and their children have not lessened over time<sup>392</sup> and, as such, there is no compelling reason to remove, or further dilute, children's inheritance entitlement. Instead, legislative change should focus on responding to real societal change such as the increased heterogeneity of family units and the rise of complex families.

Complex families raise a particular set of issues in an inheritance context because children's inheritance rights in Scotland cannot be understood in isolation from spouses' inheritance rights.<sup>393</sup> This has become increasingly important in contemporary society because the spouse's right and the children's right share their origins in an understanding of family which is based on life-long monogamous

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<sup>391</sup> See Introduction, section 3.

<sup>392</sup> That is not, however, to say that the nature of those obligations has not evolved, as will be discussed in subsequent chapters.

<sup>393</sup> As was explained in the Introduction, *legitim* and the *jus relictii/relictæ* have always been interrelated insofar as the size of the spouse's share depends on whether there are also children (and vice versa). With the introduction of prior rights, and the sharp increase in the value of prior rights in recent years, the children's right is even more dependent on the spouse's rights, and this will only be exacerbated under the proposed changes.

marriage, an understanding that is no longer fully adequate. Life-long monogamous marriage was never a universal experience, but this mattered little to children in an inheritance context as, provided they were legitimate, they inherited ahead of the spouse on intestacy.<sup>394</sup> This meant that even if a father remarried, the children's rights were unaffected. However, when prior rights were introduced—a welcome remedial measure to a system that treated spouses as lesser than children—the position of an intestate's children was radically altered. In many cases, satisfaction of prior rights exhausted (and continues to exhaust) the entire estate, leaving nothing available for payment of *legitim* and the distribution of the free estate. In those instances where the surviving spouse is also the other parent of the deceased's children, the change has been of little consequence; however, where this is not the case, the importance of “conduit theory” becomes more evident.

Conduit theory states that surviving spouses occupy “a dual role” in that, as well as being the primary beneficiaries of the deceased's estate, they are also “conduits” through which the couple's mutual children will benefit.<sup>395</sup> In short, conduit theory assumes that the deceased's children will “eventually inherit any unconsumed portion” of the deceased's property when the surviving spouse dies.<sup>396</sup> However, where the deceased's children are not also the children of the surviving spouse, conduit theory maintains that the surviving spouse is a “less reliable conduit” and cannot always be depended upon to pass on to the deceased's children on his own death.<sup>397</sup> In the Scottish context, the operation of conduit theory<sup>398</sup> can perhaps

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<sup>394</sup> Prior to the introduction of the Succession (Scotland) Act 1964, the law of intestate succession provided that a deceased's person's estate passed to the heir-in-law in regard to heritage and to the heirs *in mobilibus* as regards moveable estate, subject to claims for legal rights (Meston (1989) at para 676). Since spouses were considered “strangers” to the deceased, with only blood relatives being considered heirs, the deceased's children (or other blood relatives) inherited at the expense of the spouse (Hiram (2007) at para 4.1).

<sup>395</sup> Waggoner, LW, “The multiple-marriage society and spousal rights under the revised Uniform Probate Code” (1991) 79 *Iowa Law Review* 223 at 232.

<sup>396</sup> *Ibid.*

<sup>397</sup> *Ibid* at 233. Waggoner's theory is also discussed at length in LC 2011 Report at para 2.67.

<sup>398</sup> It goes without saying that the fact that the child's parents were married at the time of the first parent's death does not mean that the parent will not subsequently re-partner. However, the attitudinal research suggests that people do not object to the surviving spouse spending what he inherited with a new partner; the objection is that the remainder then passes to the second spouse (and her children). By maintaining a fixed legal share for children, the child can make a claim if the parent (either the first or second of his parents to die) is in a relationship at the time of his death with someone who is not his other parent.

explain why children may be more likely to claim *legitim* in a testate estate “where the legatee is not the children’s parent.”<sup>399</sup>

However, objection to a second spouse inheriting to the exclusion of the children from the first marriage is expressed not only by the “disappointed beneficiaries” but by society at large. Several empirical studies, including my project, have shown participants in general to be “particularly troubled” by resources “passing under the control of the second family and thence ‘out of the family.’”<sup>400</sup> In the vast majority of cases, the participants’ consternation related not to notions of preserving the bloodline, but to ensuring that the deceased’s children from the first family were also recognised.<sup>401</sup>

### 3.2 The family unit

From the outset it should be stated that, while family will be discussed in this thesis as comprising adult partners and children, this reflects only the historical structure of the law, the parameters of the SLC study and the questions at the heart of this study. It in no way implies that other kin groupings or structures have a lesser claim on the term family.

When the Institutional writers set down their treatises on Scots law, they agreed that the family comprised two pillars: husband and wife, and parent and child. In their essence these pillars remain unchanged: while today couples may be same-sex, unmarried and/or child-free by choice, committed adult partners and/or children normally feature in people’s definition of “my family,” where they have such relationships. Certainly, for succession purposes, an individual’s kin group almost always includes biological children and spouses.<sup>402</sup> In spite of this, the SLC reforms advocate abolishing – or severely curtailing – recognition for the parent-child relationship, apparently on the ground that families have changed.<sup>403</sup> However, this

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<sup>399</sup> SLC 2009 Report at para 3.16. This view was also expressed by Miss Scobbie in the elite interviews.

<sup>400</sup> Finch and Mason (2000), 37.

<sup>401</sup> Finch and Mason, for example, found participants to be particularly horrified where the people who ultimately benefited from an inheritance had no relationship with the deceased member of the “first family,” particularly where they inherited ahead of the deceased’s own children (*ibid*, 33-34).

<sup>402</sup> Finch and Mason (2000), 58.

<sup>403</sup> See discussion in SLC 2009 Report at paras 1.3 and 3.17.

thesis takes the view that, while families have undoubtedly changed, the main change has occurred in the diversity of relationships that can today fall under the two pillars of the family, as opposed to the pillars themselves.

### 3.3 Marriage

For the Institutional writers, the twin aspects of marriage were property and procreation. In the seventeenth and eighteenth centuries, marriage was clearly a relationship designed to provide men with property and power, and women with support and security.<sup>404</sup> However, it was also—and equally importantly—a prelude to family: marriage and children were two sides of the same coin. Marriage was the first step in founding a family and, while marriage law governed the property consequences for the family unit in life, succession law safeguarded the perpetuity of the family by ensuring that the father’s assets passed to the next generation. As Adam Smith observed, “the great effect of marriage is that children are looked on as legitimate and inherit from their father.”<sup>405</sup>

#### 3.3.1 Obligations between spouses

The Institutional texts set down the obligations between spouses, both in life and in death, focusing primarily on the husband’s rights. In exchange for the husband’s extensive powers over his wife’s person and property, the husband<sup>406</sup> had an obligation “to Aliment and provide for the Wife in all necessars, for her Life, Health and Ornament,”<sup>407</sup> although Stair noted that only “the duties of Aliment and Intertainment”<sup>408</sup> were enforceable. The obligation of aliment still exists today, although it is now a statutory duty enforceable against both husbands and wives.<sup>409</sup>

Historically, due to the wife’s legal subservience to the husband,<sup>410</sup> reciprocal spousal obligations were limited, but some did exist. These included the civilly enforceable

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<sup>404</sup> Sutherland (2004) at para. 504.

<sup>405</sup> Smith, A, *Lectures in Jurisprudence* (Liberty Fund, 1982) edited by Meek, RL, Raphael, DD and Stein, PG (The Glasgow Edition of the Works and Correspondence of Adam Smith).

<sup>406</sup> A wife was not under a like obligation prior to the enactment of the Family Law (Scotland) Act 1985 (FLSA 1985), “her obligation being merely to relieve her husband from indigence if she had the means” (SME, Child and Family Law Reissue, Sutherland (2004) at para 545).

<sup>407</sup> Stair, *Institutions*, 1.4.10.

<sup>408</sup> *Ibid.*

<sup>409</sup> FLSA 1985 s.1(1)(a)(b).

<sup>410</sup> Clive, EM, *The Law of Husband and Wife in Scotland* (2<sup>nd</sup> edition, W. Green, 1982), 11.

obligations of cohabitation, or adherence,<sup>411</sup> as well as an oblique reference to those obligations “which are naturally in the minds and affections of each to other.”<sup>412</sup> These latter obligations were not elucidated by Stair, but presumably referenced notions of love and respect. A lack of detailed consideration of the emotional aspect of marriage is unsurprising in expository legal texts and does not mean that emotion was entirely absent from the Institutional writers’ conception of marriage. Nevertheless, marriage was a relationship based on duty and responsibility and it was not until the late eighteenth century that leading scholars began focusing on contemporary notions of romantic love and companionship in marriage.<sup>413</sup>

### 3.3.2 Common property

It cannot be ignored that marriage was a property-based relationship which, until relatively recently, affected women’s property rights.<sup>414</sup> Indeed, as Erskine observed, marriage entirely subsumed a woman’s personhood.<sup>415</sup>

The husband acquires by the marriage, a power over both the person and the estate of the wife. Her person is in some sort sunk by the marriage; so that she cannot act by or for herself: and as for her estate, she has nothing that can be truly called her own.

This legal powerlessness was essentially attributable to the operation of the *jus mariti* and the *jus administrationis* that flowed from the contract of marriage. These rights lay at the heart of the Scots law of marriage until the nineteenth century and underpinned succession law.

The *jus mariti* was the husband’s right in the wife’s moveable property and meant that

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<sup>411</sup> Stair, *Institutions*, 1.4.10.

<sup>412</sup> *Ibid.*

<sup>413</sup> See for example, Kames, HH, *Sketches of the History of Man*, Volume 1, SK VI, “Progress of the Female Sex;” Smith (1982),153; Hutcheson, F, *System of Moral Philosophy in three books*, (1755)(Leechman W, ed) Book III, Of Civil Polity, Chapter 1, 184. For general discussion see Barclay, K, “Intimacy and the life cycle in the marital relationships of the Scottish elite during the long eighteenth century,” (2011) 20 *Women’s History Review* 189 at193 or Leneman, L, *Alienated Affections: The Scottish Experience of Divorce and Separation, 1684-1830*, (Edinburgh University Press, 1998), 4.

<sup>414</sup> It was not until the enactment of the FLSA 1985 that Scotland finally had legislation explicitly stating that marriage did not affect property rights (s 24). However, in practice, from the enactment of the Married Women’s Property (Scotland) Act 1920, which finally abolished the husband’s right of administration, unless the wife was in minority, marriage had little effect on a women’s property rights (Sutherland (2004) at para 542).

<sup>415</sup> Erskine, *Institute*, 1.6.19.

her moveable property became the absolute property of the husband upon marriage.<sup>416</sup> The *jus administrationis* was the husband's right of administration over his wife's heritable estate and her paraphernalia<sup>417</sup> (her dress or habiliments and her personal jewels or ornaments).<sup>418</sup> This meant that, although the wife theoretically owned the property, she required her husband's consent for any dealing with it. Furthermore, as the husband had "sole and unaccountable administration"<sup>419</sup> of her property he was entitled to "sell, give away or even squander" it.<sup>420</sup> These rights were absolute and prior to the eighteenth century there was no possibility of renouncing them by contract.<sup>421</sup> The *jus mariti* was finally abolished by the Married Women's Property (Scotland) Act 1881 and the *jus administrationis* with the enactment of the Married Women's Property (Scotland) Act 1920.<sup>422</sup>

The SLC has described the *jus mariti* and the *jus administrationis* as the dominant features of "a primitive system of community of goods," also referred to as the *communio bonorum*.<sup>423</sup> The *communio bonorum* is a controversial subject in Scots law, with some arguing that it was merely a foreign import and not truly an indigenous feature of Scots law.<sup>424</sup> However, while there is little doubt that the Scottish conception of common property was indeed a "legal solecism,"<sup>425</sup> it cannot be denied that it was an accepted feature of Scots law—at the very least throughout the seventeenth and eighteenth centuries—and that its longevity was in part related to the law of succession. This is because, while the *jus mariti* stripped the wife of her rights for the duration of the marriage, it gave her certain rights upon its dissolution.

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<sup>416</sup> Scottish Law Commission, *Matrimonial Property* (CM 57, 1983), volume 1 at para 1.3, henceforth CM 57.

<sup>417</sup> Paton, GCH, "Husband and Wife: Property rights and relationships" in *An Introduction to Scottish Legal History* (The Stair Society, Vol 20, 1958), 104.

<sup>418</sup> *Ibid*, 100.

<sup>419</sup> Stair, *Institutions*, 1.4.8.

<sup>420</sup> Paton (1958), 100.

<sup>421</sup> Prior to the decision in *Walker v The Creditors of her Husband* (1730) Mor 5841 antenuptial contracts whereby the husband renounced his *jus mariti* were thought to be ineffectual (CM 57 at para 1.3.). Similarly, it was not until 1754 that the *jus administrationis* could be excluded by contract (Crawford, E and Carruthers, J, *Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law* (2001) National Report: United Kingdom (Scotland), European Commission, JAI/A3/2001/03 at para 1.1.2.1).

<sup>422</sup> Sutherland (2004) at para 542.

<sup>423</sup> CM 57 at para 1.5.

<sup>424</sup> See discussion in Gardner (1928) at 78.

<sup>425</sup> *Fraser v Walker* 10 M 837, per Lord Kinloch, cited *inter alia* in Cameron, PH, *Summary of the Law of Intestate Succession in Scotland: with a brief overview of the Law of Intestate Succession in England* (2nd edition) (Bell and Bradfute, 1884), 90.

As Stair explained, upon the husband's decease, the wife received her "relict's third or half of moveables...[as]...a division of that communion of moveable goods, that was competent to the married persons during the marriage."<sup>426</sup> This, he argued, meant that although the husband's power had "the effects of property during the conjugal society,"<sup>427</sup> it was not a "power of property" as it subsisted only as long as the marriage.<sup>428</sup>

Although Bankton and Erskine also understood the wife's *jus relictæ* to be a share of the communion of goods,<sup>429</sup> they were less generous than Stair in their interpretation of the *jus mariti*. Erskine recognised that the husband was in fact "truly proprietor" of the wife's moveable goods, although he attempted to square the circle by claiming that, while the husband's "absolute power...[...]. . . may be thought to be inconsistent with the notion of a communion of goods"<sup>430</sup> it was simply a consequence of his "confessed superiority"<sup>431</sup> over the wife, a superiority which required this particular partnership to be different from an ordinary contract. In other words, he adhered—not entirely convincingly—to the view that the communion of goods involved a genuine partnership, albeit an unequal one. For his part, Bankton was even more sanguine about what the communion of goods actually entailed for the wife, observing that "it may justly be said, that "whatever falls under the communion of goods belongs to the husband, *jure mariti*, in the same manner as if it had been originally his."<sup>432</sup>

Viewed from a contemporary perspective, the *communio bonorum* was a hollow partnership and one that is well consigned to the annals of history. However, although the partnership created legally detrimental consequences for the wife, it does not necessarily follow that the sentiment on which it was partially based—the view that couples pool their resources—is not valid. Indeed, although marriage clearly no longer affects property ownership,<sup>433</sup> it appears that a notion of common property still

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<sup>426</sup> Stair, *Institutions*, 1.4.21, See also *Ibid*, 3.8.43.

<sup>427</sup> *Ibid*, 1.4.9.

<sup>428</sup> *Ibid*.

<sup>429</sup> Bankton, *Institute*, 1.5.10, Erskine, *Institute*, 1.6.41.

<sup>430</sup> Erskine, *Institute*, 1.6.13.

<sup>431</sup> *Ibid*.

<sup>432</sup> Bankton, *Institute*, 1.5.82.

<sup>433</sup> Note that while marriage does not affect property ownership throughout the course of the marriage, a form of "deferred community of acquests" arises on divorce in so far as the FLSA 1985 s 9(1)(a) stipulates that the net value of the matrimonial property should be shared "fairly" between the parties to

exists in modern Scottish society. This is a view that the SLC confirmed in its 1984 study on matrimonial property<sup>434</sup> and one which was also very present in the empirical findings of this project. As will be shown, this view manifested itself in two ways: firstly, participants relied on this view to explain why they felt surviving spouses were entitled to a significant share of the deceased's estate; and, secondly, where the surviving spouse was not also the parent of the deceased's child, the view underpinned the commonly held belief that the children should get something to reflect their predeceased parent's contribution to the recently deceased parent's estate. This will be explored fully in chapters four and five.

### 3.3.3 Marriage and parenthood

Having considered the relationship between marriage and property, attention must now be turned to the role of marriage as the foundation of the family. As aforementioned, for the Institutional writers marriage was primarily a contractual arrangement that gave rise to certain rights and responsibilities. These rights and responsibilities meant that, at least theoretically, almost everyone was provided for: a man gained control of his wife's resources and had to use them, together with his own, to ensure that his wife was provided for adequately. Yet creating this unit was not simply for the benefit of the two contracting parties; crucially, it was also considered necessary to allow the next generation to flourish. From the Institutional viewpoint, without marriage, there was no society:<sup>435</sup>

Marriage, as being the foundation of human race and society, and which commenced in the state of innocency, well deserves the first place among natural obligations.

Indeed, so closely intertwined were marriage and procreation, that marriages were held to be null where either party was incapable of procreation “for such marriage...[wa]s inconsistent with the propagation of mankind.”<sup>436</sup> However, while

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the marriage. Matrimonial property is defined in s10(4) as all property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party).

<sup>434</sup> Scottish Law Commission, *Family Law Report on Matrimonial Property*, (Scot Law Com No 86, 1984) at paras 2.6 and 2.7.

<sup>435</sup> Bankton, *Institute*, 1.5.1.

<sup>436</sup> Erskine, *Institute*, 1.6.7.

Bankton described procreation as the “principal design of marriage,”<sup>437</sup> it may be more accurate to state that legitimising the children of the union was the principal goal. A child was *filius nullius* if his parents were unmarried, not even recognised as of his mother.<sup>438</sup> But producing “legitimate” children did not in itself create “good” families: “the proper education of offspring,” central to “the happiness of mankind,” required that both parents provided “a constant...attendance for many years,”<sup>439</sup> and, as such, it was generally accepted that the only “natural” end to marriage was death.<sup>440</sup>

The extent to which the “nuclear family” was ever “a wholly accurate representation of Scottish life” is open to question, with historians pointing, for example, to high rates of lone motherhood during and immediately after the First and Second World Wars.<sup>441</sup> Nevertheless, while evidence suggests that “the structures of family life that many people believe to be new since the 1960s<sup>442</sup>...have a much longer history” than is often thought,<sup>443</sup> it seems equally clear that the nuclear family model reflected how scholars and lawmakers thought people ought to be living. This was, at least in part, because, prior to the 1960s, marriage was conceptualised as a “public duty” rather than a “private arrangement”<sup>444</sup> and it was on this understanding of normative duty that the law of succession developed.

### 3.4 The purpose of succession law

Simply put, “the chief concern of the law of succession, whether *ex lege*,<sup>445</sup> testate or intestate...[is]...to identify the property which the deceased owned or controlled at his death and to bring about its distribution among those entitled to succeed.”<sup>446</sup>

Beyond regulating the extent of a testator’s freedom to test, the law plays a minimal

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<sup>437</sup> Bankton, *Institute*, 1.5.52.

<sup>438</sup> Scottish Law Commission, *Family Law: Report on Illegitimacy*, (Scot Law Com No 82, 1984) at para 2.2.

<sup>439</sup> Hutcheson (1755), 150.

<sup>440</sup> Stair, *Institutions*, 1.4.7.

<sup>441</sup> Sutherland (2004) at para. 69.

<sup>442</sup> E.g. cohabitation, many births outside marriage and transient family relationships (Evans, TE, “The other woman and her child: extra-marital affairs and illegitimacy in twentieth-century Britain” (2011) 20 *Women’s History Review* 47 at 48).

<sup>443</sup> *Ibid.*

<sup>444</sup> *Ibid* at 59.

<sup>445</sup> Strictly speaking, *legitim* and the *ius relictii/ius relictiae* are not claims on the testate or intestate estate but arise *ex lege* – that is to say, by the operation of the law alone.

<sup>446</sup> Meston (1989) at para 605.

role in testate succession: subject to the operation of legal rights, a testator is free to dispose of his estate as he sees fit.<sup>447</sup> In contrast, in the case of intestate succession and *ex lege* provisions, legislators must decide both who should benefit from the deceased's estate and how the entitlements of the various beneficiaries should be ranked.

In making these decisions, lawmakers inevitably privilege certain beneficiaries over others, but justifying why a particular beneficiary should be favoured is not always self-evident. This is particularly true today as succession law strives not just to impose a normative view of what the deceased should do but also to reflect the choices people actually make in life.<sup>448</sup> Typically, in defending their decisions, legislators and law reformers rely on variations of a few commonly cited justifications: the need to provide a social safety net;<sup>449</sup> the duty to respect “common property” and common endeavour;<sup>450</sup> the responsibility to reflect prevailing social norms;<sup>451</sup> the requirement to reflect lifetime legal obligations;<sup>452</sup> and the duty to respect the presumed intent of the deceased.<sup>453</sup>

While none of these commonly advanced justifications is entirely unassailable,<sup>454</sup> together they have considerable merit and their value as guiding criteria in distributing an intestate estate is difficult to contest. In particular, the concept of “presumed intent,” which can be traced back at least as far as the Institutional

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<sup>447</sup> The law does impose some limitations. For example, statutory restrictions prevent the creation of successive life interests while common law restrictions can prevent bequests the courts consider to be “extravagant, pointless or even risible” (For discussion of restraints on testamentary freedom see Hiram (2007), Ch 10).

<sup>448</sup> In contrast, in previous centuries, lawmakers were arguably more concerned with reflecting how people ought to behave than reflecting their actual experiences. For example, it is not thought that parents loved their “illegitimate” children any less than their *legitimate* children in centuries and decades past; nonetheless, legislators of the day did not seek to reflect this reality in the intestate succession framework.

<sup>449</sup> Cremer, TB, “Reforming intestate inheritance for stepchildren and stepparents” (2011) 18 *Cardozo Journal of Law and Gender* 89 at 91.

<sup>450</sup> As was discussed in 3.3.2 above, the wife's *ex lege* entitlement was historically understood as a division of the common fund. Today, regardless of the legal position, couples are generally understood to own property in common (see, for example, discussion in Finch and Mason (2000), 71).

<sup>451</sup> Reid et al. (2015), 447.

<sup>452</sup> In *Tataryn v Tataryn's Estate*, for example, the court held that the legal obligations which society imposes on a testator during his lifetime are an important indication of the content of the legal obligation to provide maintenance and support which is enforceable after death. See also Reid et al. (2015), 448.

<sup>453</sup> See, for example, Meston (1989) at para 675 or Reid et al. (2015), 446.

<sup>454</sup> For example, as Reid et al. observe, few people would wish their estate to pass to a remote relative whom they had never met (Reid et al. (2015), 446).

writers,<sup>455</sup> appears to be the most common justification advanced in support of intestacy rules.<sup>456</sup> This is unsurprising, as the term readily subsumes the notions of assumed duty and prevailing social norms from which it cannot truly be separated. That is to say, while redolent of personal choice, “presumed intent” derives at least in part from what the intestate *ought* to have intended<sup>457</sup> and determining what people ought to have intended is informed, at least in part, from the legal obligations they have accepted in life.

Thus, as conceptions of family and family obligation change, so too do conceptions of presumed intent. Indeed, as Reid et al. have observed, presumed intent has been used at separate times in history to justify both the descendants’ and the spouse’s “primary entitlement.”<sup>458</sup> In more recent times, changing understandings of duty and intent have led to significant changes in the scheme of intestate distribution: the Succession (Scotland) Act 1964 was amended by the Civil Partnership Act 2004 to allow civil partners to inherit in the same way as spouses,<sup>459</sup> while the Family Law (Scotland) Act 2006 introduced intestacy rights for cohabitants.<sup>460</sup> Conceptions of family will continue to evolve and the concomitant changes in conceptions of presumed intent will likely be used to advance the rights of other putative beneficiaries in the future. Certainly, those who advocate for the inclusion of stepchildren in the intestacy framework have argued that to exclude them is to fail to give effect to the deceased’s testamentary intent.<sup>461</sup>

Presumed intent does not, however, concern only who should be included in intestacy provisions, but also who should be prioritised. In this sense, recent family law reforms

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<sup>455</sup> Bankton, for example, stated that the law of intestate succession “calls those to his succession whom it presumes he would have named, if he had made any disposition of the same” (Bankton, *Institute*, 3.4.1) while Erskine argued that “succession *ab intestato* is grounded on the presumed will of the deceased” (Erskine, *Institute*, 3.9.4).

<sup>456</sup> Reid et al. (2015), 446.

<sup>457</sup> It is also possible to garner some understanding of “presumed intent” by sampling actual wills and noting testamentary preferences. As has been observed, wills are typically made by those who are better off and cannot be assumed to be representative of the population at large (Reid et al. (2015), 447).

<sup>458</sup> *Ibid*, 448. Equally, as will be discussed in Ch 6, p179 presumed intent was once advanced as a reason to exclude adopted children from succession law but was later used to justify their inclusion.

<sup>459</sup> Succession (Scotland) Act 1964 s 2(1)(e) was amended by the Civil Partnership Act 2004 ss 261(2), 263(10)(c).

<sup>460</sup> This is not to say that spouses and cohabitants are treated identically. For an overview of cohabitation rights on succession and the proposed reforms see SLC 2009 Report Part 4.

<sup>461</sup> See for example, Cremer (2011) at 92.

have proved relatively straightforward: at the point of death, the deceased will have either an opposite-sex spouse or a same-sex spouse.<sup>462</sup> As a result, there is little competition between the “original” beneficiary and the “new” beneficiary and no order of precedence has to be established between them: the entitlement of an opposite-sex spouse is entirely unaffected by the new entitlement of a same-sex spouse.<sup>463</sup>

In contrast, the incremental improvements in the spouse’s position have had an effect on the children’s claim on intestacy. In the context of an intact family, even where the value of prior rights is high and the value of the estate low, this is relatively unproblematic: it is generally agreed both that the spouse would want to – and that the spouse ought to – provide for his spouse ahead of their mutual children on the understanding that the surviving spouse would pass any remaining assets to the children upon her death. However, these changes have not occurred in a vacuum, but at a time when there has also been a rise in separation and remarriage. This is important as, whereas the succession rights of spouses and children continue to be intertwined, marriage and parenthood can now be decoupled.<sup>464</sup> In such instances, a surviving spouse may not make provision for the deceased’s children upon his death, and therefore it may no longer be appropriate to assume that an intestate would want the full estate to pass to the surviving spouse.

Certainly, Reid et al. have argued that as “family patterns become ever-more complex” and the range of possible intestate succession outcomes “correspondingly ever-more wide” deciding who should benefit becomes “increasingly difficult and

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<sup>462</sup> Although, of course, in some instances, the deceased may have both a spouse and a cohabitant (SLC 2009 Report at para 1.25).

<sup>463</sup> Of course, in those cases where the deceased had both a spouse and a cohabitant, the spouse’s claim is affected by the existence of the cohabitant, although, under FLSA 2006 s 29, the spouse’s prior rights and legal rights are deducted before any award can be made to the cohabitant (for further discussion see *ibid.*, at paras 4.24-4.30).

<sup>464</sup> While many parents will be married to the other parent of their child, it is now equally possible for individuals to become parents: for example, individuals can adopt (Adoption and Children (Scotland) Act 2007 s 30(1)(a), (2) and (6)). However, where the parents are in a relationship with each other, marriage does play a role in establishing paternity insofar as s 5(1)(a) of the Law Reform (Parent and Child)(Scotland) Act 1986 stipulates that a man shall be presumed to be the father of a child if he was married to the mother at any time from the conception to the birth of the child. A separate presumption operates pursuant to s 5(1)(b) of the 1986 Act where the parents are unmarried. Finally, while marriage and parenthood may be intertwined for a period of the child’s life, divorce and separation mean that the two may become decoupled.

contested.”<sup>465</sup> However, while this observation is undoubtedly accurate as regards the potential entitlements of half-siblings, stepchildren and perhaps even cohabitants,<sup>466</sup> it is less clear that the children’s entitlement is in anyway “difficult or contested.” Finch and Mason, for example, found that, while English kinship was “highly flexible,” the parent-child relationship was nonetheless “both predictable and privileged.”<sup>467</sup> Similarly, as discussed in Chapter 1,<sup>468</sup> the Canadian court in *Tataryn* opined that there was considerable less “uncertainty” than often thought surrounding conceptions of parental responsibility.<sup>469</sup> It is not clear, therefore, that the increasing complexity of family relationships has affected the parent-child relationship in a way that would cause law reformers to struggle to determine whether the deceased would want his children to inherit.

There is, however, no doubt that determining how the *balance* should be struck between the claims of competing beneficiaries does pose difficulty. Yet, as this tension speaks directly to the new socio-demographic realities<sup>470</sup> the SLC sought to reflect in the reform process, it is difficult to understand why it chose to ignore the way in which these new realities affect children’s inheritance rights.<sup>471</sup> Two possible reasons emerge: firstly, the pursuit of simplicity and ease of administration;<sup>472</sup> and, secondly, deference to personal choice and individualism.

Understandings of personal choice and individualism appear to have profoundly influenced the reform proposals with the “current relationship of choice”<sup>473</sup> being favoured to the virtual exclusion of all others in both testate and intestate

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<sup>465</sup> Reid et al. (2015), 448.

<sup>466</sup> As will be shown in chapters 6 and 7, there is no clear consensus that automatically including stepchildren and half-siblings as heirs on intestacy would give effect to “presumed intent.”

<sup>467</sup> Finch and Mason (2000), 59.

<sup>468</sup> Ch 1, 1.2.2.

<sup>469</sup> [1994] 2 SCR 807.

<sup>470</sup> In the Introduction to the 2009 Report, the SLC stated that “the law has not kept pace with all the changes which are occurring” (para.1.3).

<sup>471</sup> Indeed, when confronted by socio-demographic trends that have indirectly weakened the children’s position on intestacy, the SLC responded not by bolstering the children’s position but by further undermining it.

<sup>472</sup> While recognising the merits of simplicity, allowing such an approach to supersede all other goals has its limitations.

<sup>473</sup> Reid (2008) at 399.

succession.<sup>474</sup> Indeed, in a remarkable argument advanced in favour of abolishing *legitim*, the SLC stressed that while the prospective entitlement of a spouse can be terminated by divorce or dissolution, there is “no legal machinery available for parents to dissolve the parent-child relationship so as to prevent their children’s claims.”<sup>475</sup>

However, while conceptions of self-determination and autonomy are undoubtedly central to contemporary family law, and in particular to adult relationships, they are tempered by equally important conceptions of obligation in the parent-child context. As such, although a parent may have no choice but to remain in a legal relationship with his child, the absence of positive consent to such a relationship cannot be taken as an indicator that he would not have intended his children to benefit from his estate. The remainder of this chapter will address the historical importance of the parent-child relationship with a view to explaining why inheritance rights for children have so long been considered important. It will conclude that maintaining provision for children gives effect to presumed intent as shaped by societal expectation, particularly in the case of first and second families.

### 3.5 The obligation between parent and child

For the Institutional writers, the relationship between parent and child was the example *par excellence* of natural law.<sup>476</sup> While money and property are discussed frankly in their commentary on marriage, the commentary on the parent-child relationship is cloaked in highly emotive language. However, in spite of this, money and property also remain at the heart of the historical conception of the parent-child relationship: parents and children had mutual financial obligations in life, obligations which, for parents, continued beyond the grave. Thus, a dual discourse emerged: on the one hand, the parent-child relationship was described in hallowed terms, a

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<sup>474</sup> While the high threshold sum obviously demonstrates a clear preference for the spouse on intestacy, the proposal to abolish or curtail the children’s legal share, while maintaining a legal share for spouses, shows a similar preference for the spouse in testate succession.

<sup>475</sup> SLC 2009 Report at para 3.30.

<sup>476</sup> For Stair, the principles of the natural law are also the principles of equity. Divine law is “that part of natural law known intuitively to all men...[while]...the law of reason is that part of the natural law deduced by reason from the divine law” (Fergus and Maher (1987) at para 401). Included in this divine law, “written by the Finger of God upon Man’s Heart,” are the principles that parents are to be “honoured” and children “loved, educated and provided for.” (Stair, *Institutions*, 1.1.3). It should be noted that Stair does not reference the spousal relationship in this section.

relationship ordained by God and worthy of the utmost reverence; on the other hand, when the reverential language is stripped back, a more prosaic picture emerges whereby reciprocal parent-child obligations provided a form of social safety net. However, rather than being contradictory, these alternative discourses appear to reflect the difference that existed between the duty in life and the duty in death.

Historically, the overarching duty that parents owed their children was the provision of aliment and education.<sup>477</sup> In this there is nothing surprising to the modern ear: few parents would contest the existence of such a duty. Where the duty, as explained by the Institutional writers, began to deviate from our contemporary perspective was in the multitude of rules that emerged to create a family-based social security network. For example, there was a strict order to the list of family members on whose shoulders the burden of care fell if the father was unable to provide for his children. Erskine set out the position as follows:<sup>478</sup>

It [the responsibility] is not limited to the father alone; though he, as the head of the family, and as the sole manger of the goods in communion, is bound most directly, and in the first place: but in default of the father, who is the ascendent in the first degree, either through death or incapacity, the burden of maintaining the children falls upon his father, or the childrens paternal grandfather, and so upwards upon the other ascendents by the father; and failing these, upon the mother, and the ascendents by her.

Although the duty to aliment and educate were initially placed on an equal footing, the duty of the family member substituting the father appears to have been limited to only the civilly enforceable duty of aliment,<sup>479</sup> again underscoring the importance of ensuring that all were provided for without burdening the State.

Finally, it should be underscored that, at the time of the Institutional writers, the rules regarding parental obligation addressed the father: the parent-child relationship, from a seventeenth and eighteenth century perspective, concerned the father and the child, to the almost total exclusion of the mother. As Clive points out, the children of the marriage were, “for purposes of guardianship, custody and access” the husband’s

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<sup>477</sup> See Stair, *Institutions*, 1.5.6; Bankton, *Institute*, 1.6.13; Erskine, *Institute*, 1.6.56.

<sup>478</sup> Erskine, *Institute*, 1.6.56.

<sup>479</sup> See for example, Bankton, *Institute*, 1.6.15.

children.<sup>480</sup> This is, of course, unsurprising as the father was the “sole manager of the goods in communion”<sup>481</sup> and, to all intents and purposes, the wife’s curator.<sup>482</sup>

Furthermore, prior to the enactment of the Married Women’s Property (Scotland) Act 1881, *legitim* could not be claimed from a mother’s estate,<sup>483</sup> depriving her of even this limited means of providing for her children.

### 3.5.1. How long does the obligation endure?

The question of the length of time the obligation between parent and child endures is important for this thesis insofar as its non-permanency is raised by the SLC to support the abolition of a fixed legal share for children.<sup>484</sup> In its 2009 Report, the SLC advanced several reasons for abolishing *legitim*, including three that it related directly or indirectly to the obligation to provide aliment. Firstly, it stated that “the child should not be able to make a claim on his parent’s estate which the child could not have made during the parent’s lifetime;”<sup>485</sup> secondly, it stated that “the obligation to relieve the needs of adult children rests on the state, not on the parent;”<sup>486</sup> and, thirdly, it stated that “a child no longer has a legal obligation to aliment an indigent parent.”<sup>487</sup> The implication is that, whereas *legitim* was once justifiable based on a historical understanding of the mutual legal obligations between parents and their children, the changes in these obligations are such that *legitim* can no longer be justified. However, it is contended that these changes primarily address the obligations parents and children owed each other in life, not in death, and so have no impact on *legitim*.

#### 3.5.1.1 Parental obligation in life

The general rule, as stated by the Institutional writers, is that the duty to aliment ended when the child reached majority:<sup>488</sup> Erskine suggested that parents must care

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<sup>480</sup> Clive (1982), 11.

<sup>481</sup> Erskine, *Institute*, 1.6.56.

<sup>482</sup> Erskine, *Institute*, 1.6.22; Bankton, *Institute*, 1.5.4.67.

<sup>483</sup> Stair, *Institutions*, 3.4.2.

<sup>484</sup> SLC 2009 Report at para 3.30.

<sup>485</sup> *Ibid.*

<sup>486</sup> *Ibid.*

<sup>487</sup> *Ibid.*

<sup>488</sup> The question of when children reached majority was not as straightforward as it is today, and Erskine suggested that factors such as social class come into play: “It does not seem fixed in general how long parents are bound to maintain their natural children: in the case of a gentleman, the obligation was found to continue till the child was fourteen years of age” Erskine, *Institute*, 1.6.56.

for their issue during their imperfect age,<sup>489</sup> and, viewing the question from a slightly different perspective, Bankton and Stair acknowledged that, although still present, parental power was “much diminished”<sup>490</sup> when children were of full age.<sup>491</sup> In this regard, the law remains largely unchanged: today the Family Law (Scotland) Act 1985, section 1(1) and (5) provides that a parent’s obligation ends when the child reaches the age of 18, or 25 if engaged in further education.

However, when the duty to aliment in life was first set down by the Institutional writers, the general rule was qualified and the entitlement was not simply coextensive with being a child. For example, while the duty to provide for the children fell on the parents in the first instance, they did not have to provide for them if another source of maintenance was forthcoming. As Stair observed, where children were “competently provided aliunde, the parents are not bound.”<sup>492</sup> Equally, the duty could subsist longer if a child who had reached majority fell into a state of want. Erskine summed up the position as follows:<sup>493</sup>

As soon as the children can subsist by their own labour or industry, the obligation ceaseth; for he who can earn his own bread, has no right or claim of maintenance from another...yet the obligation which lies on parents to maintain their indigent children is perpetual.

The SLC is obviously correct in stating that this duty no longer exists and that, instead, “the obligation to relieve the needs of adult children rests on the state.”<sup>494</sup>

However, as it has always been possible to distinguish the duty in life from the duty in death, it is not clear that this change has any bearing on *legitim*.

### 3.5.1.2 Parental obligation in death

The duty in life, although more clearly defined than in previous centuries, has always been relatively unambiguous. Although Stair asserted that parents had certain obligations in life that arose from affection as opposed to legal obligation,<sup>495</sup> his

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<sup>489</sup> Erskine, *Institute*, 1.6.53.

<sup>490</sup> Stair, *Institutions*, 1.5.6.

<sup>491</sup> Bankton, *Institute* 1.6.1 and 1.6.2.

<sup>492</sup> Stair, *Institutions*, 1.5.6.

<sup>493</sup> Erskine, *Institute*, 1.6.56.

<sup>494</sup> SLC 2009 Report at para 3.30.

<sup>495</sup> Stair, *Institutions*, 1.5.7.

commentary on lifetime obligations primarily related to those obligations that were legally enforceable. This is unsurprising as it was those enforceable lifetime obligations that ensured children (and their parents) did not become a burden on the state.

In contrast, in elucidating the duty that existed in death, the Institutional writers focused as much on normative, moral duties as they did on legal obligations. Two different duties were identified: the overarching moral duty of the parent to make provision for his children upon his death, and the specific legal entitlement of the children to claim *legitim*. Indeed, the *principal* duty to provide in death, as described by Erskine, was in fact the normative duty. This duty is clearly an extension of the duty that existed in life:<sup>496</sup>

A father is not barely bound to maintain his children during his own life; he ought to provide for all of them, that they may be able to live comfortably after his death: it is therefore his duty, either to make over by a deed *inter vivos*, or to bequeath to each of them by testament, such a patrimony or provision, in land, money, or other subjects, as is suitable to his circumstances.

However, while the duty to provide aliment in life was (and is) legally enforceable, Erskine stated that the duty to provide aliment in death was “one of those which is left entirely upon the conscience without being enforced by any civil sanction.”<sup>497</sup>

Similarly, citing the Bible,<sup>498</sup> Stair observed that “competent provision” must be arranged for the children, regardless of civil obligation, as “he that careth not for his family, is worse than an Infidel”.<sup>499</sup>

The second duty, *legitim* is—unlike the general duty to make provision for one’s children—clearly enforceable; however, the rationale for this distinction is unclear. Two central views emerged, depending on different interpretations of the origins of *legitim*. The first, advanced by Stair, held *legitim* to be a specific category of the parent’s general duty to provide. Stair held that *legitim* was “so called, because it flows from the natural Obligation of Parents to provide for their Children”.<sup>500</sup>

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<sup>496</sup> Erskine, *Institute*, 1.6.58.

<sup>497</sup> *Ibid.*

<sup>498</sup> 1 Timothy 5 v 8.

<sup>499</sup> Stair, *Institutions*, 1.5.7.

<sup>500</sup> *Ibid.*, 3.8.44.

However, despite their shared origins, Stair understood there to be key differences between the duty in life and *legitim*. Firstly, whereas aliment was only available to adult children in certain circumstances, *legitim* was available to all legal children, regardless of whether they were in a state of want.<sup>501</sup> Secondly, while the law recognised that an illegitimate child was entitled to aliment from his parents in life,<sup>502</sup> he had no claim to *legitim* prior to the implementation of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968.<sup>503</sup> This in itself does not explain why *legitim* is legally enforceable while the general duty to provide is not, but it is reasonable to assert that this allowed freedom of testation to be balanced with the duty to provide. As Kenneth Reid explained “in earlier times” there existed a notion that moveable property (against which *legitim* is exercisable) was of little value.<sup>504</sup> Accordingly, *legitim* was a legally enforceable minimum level of provision, which a “good” father would supplement with additional provision.

For his part, while maintaining that *legitim* was a “natural right,”<sup>505</sup> Erskine characterised it not as an extension or variation of the duty to provide in life, but as a deferred share of the community of goods:<sup>506</sup>

It may be thought not reconcileable to the communion of goods, which is by our law consequent upon marriage, common to man and wife, should upon its dissolution be divided, not entirely between the two socii, to whom it belonged, but that a third party, the children, should also be entitled to a share of it. But it must be attended to, that by the law of nature itself, children have a right, *upon their first existence, to some share at least of the goods which formerly belonged in common to their two parents*, of whom they may, without impropriety, be reckoned a part.

This is an easily accessible explanation—although not universally accepted<sup>507</sup>—and

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<sup>501</sup> *Ibid*, 3.8.45 (Stair observed “nothing can take away the bairns’ *legitim*, unless it be discharged”). In this not only is *legitim* different from the duty to aliment in life, but also from the general duty to provide in death, both of which depend “on the ability of the parents, and the necessity of the children” *Ibid*, 1.5.7. In other words, it is disingenuous for the SLC to focus on changes to parental duty in life to justify abolishing *legitim*, as *legitim* always had its own unique character and was never construed as a simple extension to parental duty in life.

<sup>502</sup> Erskine, *Institute*, 1.6. 51.

<sup>503</sup> Ss 1 and 2.

<sup>504</sup> Reid, KGC and Zimmerman, R (eds), *A History of Private Law in Scotland, Vol 1: Introduction and Property* (Oxford University Press, 2000), 249.

<sup>505</sup> Erskine, *Institute* 3.9.15.

<sup>506</sup> *Ibid*.

<sup>507</sup> Stair attributed only the wife’s interest in the moveable goods to the *communio bonorum* (Stair, *Institutions* 3.8.30).

one which serves to highlight the importance of the law of succession in the conception of the *communio bonorum*.

Ultimately, the relative merits of these arguments are of little importance: whether the legal origins of *legitim* are rooted in a doctrine of community of goods<sup>508</sup> or in the duty to aliment matters little in contemporary Scotland. Rather, what is striking is that both lines of thought persist today. As will be shown in chapters four to seven, the empirical study revealed many participants—while rejecting the prescriptive, moralistic language of the Institutional writers—to believe that parents “ought” to make some provision for their children, where they have the means to do so. Furthermore, and particularly where the surviving spouse is not the child’s other parent, many participants believed that the child should receive something from his deceased parent’s estate to reflect the other parent’s contribution to that estate. In other words, what once formed the *legal* justification for the existence of *legitim* (a lifelong duty to aliment and a conception of common property) now forms the *moral* justification for its existence.

### 3.5.2. The filial obligation: an asymmetrical duty

Although today we primarily think of family obligations as running unilaterally from the parent to the child,<sup>509</sup> until as recently as 1985, children also had a legally binding financial responsibility towards their parents.<sup>510</sup> In its 2009 Report, the SLC made the unusual assertion that *legitim* can be understood as the counterpart of that obligation, suggesting that as that obligation no longer exists neither should *legitim*.<sup>511</sup> This conceptualisation of *legitim* does not correspond to those discussed above, but – more importantly – it also overlooks the fact that the obligation between parent and child has always been one of asymmetrical reciprocity. As such, lessening the child’s duty to the parent does not require a corresponding reduction in the parent’s duty to the child.

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<sup>508</sup> Gardner (1928) at 77.

<sup>509</sup> This remains true although adult children increasingly play the role of carers and, in some North American jurisdictions attempts have been made to revive filial support laws (see discussion in Pearson, KC, “Filial support laws in the modern era: domestic and international comparison of enforcement practices for laws requiring adult children to support indigent parents” (2013) 20 *Elder Law Journal* 269.

<sup>510</sup> The obligation was abolished by FLSA 1985 s 1(3).

<sup>511</sup> SLC 2009 Report at para 3.20.

The Institutional writers identified two separate duties children owed their parents. Firstly, in certain circumstances, children were obliged to work for the benefit of their fathers. For Erskine, the father was “intitled to all the profits accruing from their labour and industry, while they continue in his family, or are maintained by him at bed and board.”<sup>512</sup> Stair was of a similar view but went further than Erskine, arguing that a father could compel his child to remain within the family home:<sup>513</sup>

From this paternal power it follows, that the parents may contain and keep their children in their families; and that they are obliged to employ their services and work for the common interest of the family; and what doth always endure, till by consent of the parents, they become forisfamiliat.<sup>514</sup>

For his part, Bankton adopted a third view, arguing that although a father could not compel an adult child to remain within the family home, he had “a right to their service for his entertainment, if they are not able otherwise to recompense him.”<sup>515</sup>

The second duty identified by the Institutional writers was the duty to provide aliment to indigent parents:<sup>516</sup>

This obligation for maintenance is reciprocal between parents and children; and hath as strong effects against the last as the first; for the tie of piety and gratitude, by which nature hath bound children, when they have a fund sufficient for it, to maintain their indigent parents, is supported by civil sanction.

Although Bankton<sup>517</sup> and Stair<sup>518</sup> were equally unequivocal as to the existence of this duty—arguing that children are under a “natural” obligation to maintain their parents in case of necessity—both were keen to explain that this did not fall foul of the Biblical command that “the children ought not to lay up for the parents, but the parents for the children.”<sup>519</sup> This suggests that both were aware that a child providing for a parent is in some way counterintuitive and is one of several ways in which the duty of a child to provide for a parent was differentiated from the duty of a parent to

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<sup>512</sup> Erskine, *Institute*, 1.6.53.

<sup>513</sup> Stair, *Institutions*, 1.5.6.

<sup>514</sup> A child becomes forisfamiliat when separated from his father’s family.

<sup>515</sup> Bankton, *Institute* 1.6.1.

<sup>516</sup> Erskine, *Institute*, 1.6.57.

<sup>517</sup> Bankton, *Institute* 1.6.20.

<sup>518</sup> Stair, *Institutions*, 1.5.9.

<sup>519</sup> Corinthians 12 v 14 cited in Stair *Institutions*, 1.5.9 and Bankton *Institute*, 1.6.20.

provide for a child.

In general, the Institutional writers depicted the duty to provide for a parent as less onerous than the duty to provide for a child: the child did not have to provide for the parent if he predeceased him;<sup>520</sup> the child did not appear bound to take the parent into his home; the duty to provide for a parent arose only if the parent were indigent;<sup>521</sup> and there was no discussion of the responsibility passing to a remoter descendant were the child be unable to discharge the duty. This asymmetry has been recognised as a feature of the parent-child relationship throughout the ages and does not appear to have provoked ire or condemnation. Indeed, for Adam Smith, such an imbalance was essential to a flourishing society:<sup>522</sup>

Nature, for the wisest purpose, has rendered, in most men, perhaps in all men, parental tenderness a much stronger affection than filial piety. The continuance and propagation of the species depend altogether upon the former, and not upon the latter.

While calls to revive the obligation a child owes a parent may be heard in some quarters,<sup>523</sup> parents generally conceive their duty towards their children to be stronger than any obligation their children owe them. Recognition of the asymmetrical nature of the relationship is essential to understanding why, despite the SLC's misgivings, "there is little to suggest that Scottish parents would consider themselves currently under a 'legal disability'<sup>524</sup> in being unable to disinherit their children.<sup>525</sup>

### 3.6 Conclusion

In contemporary society, providing for the surviving spouse upon the death of the other spouse requires no justification: it is widely agreed that the surviving spouse has a strong moral claim on the deceased's assets, which many people view as belonging to the couple as a unit.<sup>526</sup> Similarly, providing for young children requires little

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<sup>520</sup> A parent cannot claim *legitim*, or an equivalent thereof, on a child's estate.

<sup>521</sup> Erskine, *Institute*, 1.6.57. In contrast, the parent had a general duty to provide for young children.

<sup>522</sup> Smith, A, *The Theory of Moral Sentiments* (Hanley (ed), Penguin Books, 2009).

<sup>523</sup> See generally discussion in Pearson (2013).

<sup>524</sup> In its discussion paper, the SLC describe *legitim* as a "legal disability" endured by parents (DP 136 at para 3.100).

<sup>525</sup> Reid (2008) at 405.

<sup>526</sup> Oldham observes that in England, it is commonly recognised that in practice a de facto community of property arises between all but the most unusual of couples (Oldham, M, "Financial obligations

justification: few would contest a parent's duty to provide for his children. However, providing for adult children on death is somewhat more complicated, and successive generations have struggled to define *why* children are felt to be entitled.

Historically, *legitim* has been explained through references to common property and the parental duty to provide aliment, explanations that do not appear fully adequate today: the duty to provide aliment is no longer life-long and, while notions of common property undoubtedly persist, the legal concept of the *jus mariti* has long been abolished. However, *legitim* was only ever construed as a minimal level of provision and a "good" father was expected to provide for his children according to his means. This normative duty flowed not from a legally enforceable obligation but from the elusive duty written in the "hearts of parents"<sup>527</sup> that has always featured in the parent-child relationship.

Today, the presence of this duty written in the hearts of parents is arguably even more important than it was in previous centuries,<sup>528</sup> and it is this duty, the duty to love one's children and to recognise them upon death, that underpins the children's entitlement to *legitim* in contemporary society. The importance of the duty is not, however, limited to *ex lege* succession, but also informs views on entitlements to intestate estates. As explained above, it is generally agreed that intestacy provisions should seek to give effect to the presumed intent of the deceased and, as parents are presumed to love their children, it is also presumed that they would want them to succeed to some of their estate.

While it might be tempting to dismiss "presumed intent" as a meaningless term, open to unlimited subjective interpretation, it has been shown to be a great deal more than another "anodyne formulation."<sup>529</sup> It reflects society's views both of what the deceased ought to do, based on assumed legal duties and understandings of moral obligations towards loved ones, and of what the deceased would want to do based, at

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within the family – aspects of intergenerational maintenance and succession in England and France" (2001) 60 *The Cambridge Law Journal* 128 at 154).

<sup>527</sup> Stair, *Institutions*, 1.5.1.

<sup>528</sup> See discussion of the contemporary trend to idealise parenthood in Eibach, RP and Mock, SE, "Idealizing parenthood to rationalize parental investments" (2011) 22 *Psychological Science* 203.

<sup>529</sup> Reid et al. (2015), 446.

least in the case of parents, on the duty written in their hearts.<sup>530</sup> In short, it “captures an essential truth”<sup>531</sup> about what the law of intestate succession is trying to do in order to meet the needs of the society it serves.

Although unequivocally determining what constitutes an acceptable understanding of “presumed intent” is not without difficulty in a heterogeneous society, it is also, at least in the context of parental obligation, less problematic than might be thought. In the course of my empirical study, I sought to understand how participants viewed parental obligation, giving them the opportunity to discuss both how they intended to provide for their children and what provision they felt other people should make for their family members. Without suggesting that children should be given an equal share to that granted to the spouse, it was clear that there was no appetite for children to be obliterated from the inheritance landscape. Thus, in order to give effect to presumed intent, it is important to provide meaningful provision for the children on intestacy, particularly where the surviving spouse is not also the other parent of the children. Further, it was shown that, for the majority of the participants, the strength of the duty “written in their hearts” was such that they did not feel that their inability to fully disinherit their children constituted a “legal disability.”

The next four chapters will consider in greater detail how contemporary society views inheritance rights, particularly in “complex” family situations, and will address what other jurisdictions have done to reflect testamentary intent, and other considerations, in their succession law frameworks. It will conclude that, while family relationships may previously have been framed in the context of family duty, they are now understood primarily as “a project of the self.”<sup>532</sup> However, while the project of the self undoubtedly reflects elements of choice and flexibility, obligation is both present and willingly embraced.

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<sup>530</sup> Stair, *Institutions*, 1.5.1.

<sup>531</sup> Reid et al. (2015), 446.

<sup>532</sup> Douglas et al. (2011) at 247.

## Chapter 4: Attitudes towards parental obligation

### 4.1 Introduction

In this first of the four chapters addressing what my empirical study reveals about attitudes to inheritance, consideration will be given to what duty, if any, a parent has towards her children at the end of the parent's life. The question arises because, as was explained previously, the SLC reforms seek to remove or severely curtail the protection from disinheritance Scottish law currently affords children.<sup>533</sup> Technically speaking, disinheritance can occur only where the deceased has left a will<sup>534</sup> and, as such, the majority of the discussion in this chapter will centre on testate succession.

Throughout the focus groups<sup>535</sup> and interviews, participants were asked to reflect on both their personal inheritance experiences and their testamentary intentions, as well as their views as to how other people had behaved in various real life and fictitious scenarios.<sup>536</sup> This chapter will discuss the data generated by these discussions, focusing on broad central themes including expectation, obligation and testamentary freedom.

### 4.2 Experiences of inheritance

All participants were asked whether they had inherited and, where they answered affirmatively, they were then invited to expand on that experience. In most cases,<sup>537</sup> this was the first question asked of participants, with a view both to launching the discussion and to setting the participants at ease by having them control the narrative.<sup>538</sup> However, although used as an “ice-breaker” the question was an important one: inheritance experiences – particularly negative ones – unsurprisingly appeared to shape the attitudes of the individuals involved, and their relaying of these

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<sup>533</sup> See Introduction, pp23-25.

<sup>534</sup> Nevertheless, participants at times understood the concept to apply to situations where the state had deprived children of their “fair” share, either by an unjust statutory regime or by demanding payment for elder care. This will be discussed in chapters 5 and 8.

<sup>535</sup> Focus groups are listed in Appendix 2.

<sup>536</sup> All scenarios are included in Appendix 1.

<sup>537</sup> It was the first question posed in 11 out of 13 instances.

<sup>538</sup> A small number of participants expressed concern that they knew nothing about succession law and would therefore be unable to answer appropriately.

complex narratives at times served to soften the more rigid views expressed by some other participants.<sup>539</sup>

The dialogue that flowed from this one simple question revealed thoughts on family property, parental duty, expectation, and autonomy, all of which will be explored more fully in the course of this and the next two chapters. Firstly, however, the question revealed that the term “inheritance” is not clearly or uniformly understood, with participants expressing different views as to what constituted a “proper inheritance.” When asked whether they had inherited, 18 participants answered in the affirmative and 12 in the negative, while five gave no recorded answer and two claimed to be unsure. The uncertainty expressed by two of the participants was initially surprising, as such a straightforward question was expected to elicit a binary response. However, closer examination revealed that the participants’ doubts were anchored in two views that arose frequently in the discussions: firstly, that the word “inheritance” involves large sums of money and is consequently a concern of the wealthy; and, secondly, that property transmission is a family affair.

#### 4.2.1 Inheritance: a question of value

Mary, a retired nurse from Greenock, expressed her uncertainty as follows:

Mary: Well, I don’t know if it’s classed as an inheritance...my parents died. I suppose it was an inheritance...they had their house...it wasn’t worth a great deal, you know, it was nothing major or anything like that...

Interviewer: Was that between you and your siblings?

Mary: Yes, there were 5 of us so obviously...[...]...So I don’t really class that as an inheritance as such...

Central to Mary’s doubt was that her parents’ house – and her eventual share of it – was worth little and so did not constitute a “proper” inheritance. It is also possible – although not fully explored – that Mary felt that people like her did not inherit; certainly, one individual turned down the invitation to participate in the study on the grounds that it was not for “people like me.”

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<sup>539</sup> This underscores one of the advantages focus groups offer over questionnaires in highlighting the inevitable inconsistencies and nuances in people’s views that emerge only through dialogue and exchange.

Mary was not alone in the view that her inheritance was not a “proper” inheritance because it was not worth a substantial amount of money. Indeed, closer examination of the data revealed that two participants who stated that they had not inherited might actually have done so. When asked whether she had inherited, Catriona, an accountant from Edinburgh, replied, “no, not anything significant.” Similarly, Tom, a retired small business owner from Glasgow, stated that he had not inherited, before adding “[unless] you call getting a painting that was up on my mother’s wall...but I would say that’s not how I understand it.” Whether Tom acquired the painting by means of a specific bequest, or merely through the distribution of his mother’s estate on intestacy, Tom did technically inherit his mother’s property; however, the low monetary value of the inheritance meant that he did not perceive it as such.

Tom’s response was particularly striking when compared to that of John, a fellow member of his group. John was the first member of the group to offer a response to the opening question, reporting that an “elderly aunt” had left him “something like £100” and remarking that he “thought that was really nice.” Similarly, Gordon reported having inherited £100 from a “social aunt,” while Carol recalled feeling “very special” when her grandfather left her £50 in his will. Unlike Tom, Mary and Catriona, these three readily categorised their bequests as an inheritance, despite their low value. This suggests that not only the amount, but also the relationship between the testator and the beneficiary influences how the inheritance is perceived. In the case of bequests from non-immediate family members, monetary value was inconsequential in determining whether the bequest was a “proper” inheritance: being *chosen* was all that mattered. In contrast, a bequest from a parent seemed to have to be more valuable in order to qualify, and extremely large in order to be in any way noteworthy.

Indeed, while Carol fondly remembered her grandfather’s bequest, she appeared to find the much larger inheritance she received from her parents far less remarkable:

Well, I’m an only child and my mother and father have both passed away. I inherited, not huge amounts, but I inherited a family home and some cash.

As a teacher and a single parent, Carol does not appear to be someone for whom money would be no object and so it is unclear why she would not consider a family home and money to be a substantial inheritance, other than because it came from her parents. Similarly, Simon, a media worker from Glasgow who had inherited his “parents’ estate...which included a house in Cornwall,” was in no doubt that he had inherited, but did not appear to view his inheritance as particularly significant.

#### 4.2.2 Inheritance: a concern of the wealthy

Carol’s and Simon’s attitudes could also stem from the pervasive view that “proper” inheritance is the exclusive purview of society’s wealthiest and, as neither considered themselves to be part of this elite, it follows that they did not consider themselves to have properly inherited. Indeed, in Group 2, the discussion of disinheritance turned to the reputed testamentary intentions of celebrities such as Nigella Lawson and Sting, perhaps indicating where the bar was set in the minds of the participants. By presenting their own inheritances as a family affair, participants were able to distance themselves from those who, in the words of Gordon, “bundled up” privilege to pass on from generation to generation.

In addition, a number of participants were quick to point out that they were “first generation middle class” or that they had grown up with nothing. It is, therefore, understandable that they experienced a degree of dissonance in classifying themselves as potential bequeathors, a group once considered an elite. This view is perhaps best reflected in a discussion between the seven participants in Group 7, all of whom were over 65:

Bill: I think, the likes of masel’, I’m the youngest in my family and I’m just about 80 and my mither and faither just had nothin’, nothin’ to come to us. It’s different today because I would say wir generation have got somethin’ to be leavin’.

Voice: Aye, that’s right.

Interviewer: Yes, yes. I think that’s...

Voice: That’ll be leavin’ something significant.

Alec: Aye, that’s right.

Bill: The likes of my mither, they left absolutely naethin’...well, not naethin’, but next door to it.

Reg: Since the house purchasin’ came in.

Voice: Aye, that’s right.

Reg: That’s yir inheritance.

In all, 13 participants reported being aged 65 or over and, of this age cohort, only Ron reported having inherited from his parents<sup>540</sup> in any meaningful way.<sup>541</sup> Indeed, 11 of the other 12 participants in this cohort specifically referenced having grown up in relative poverty.<sup>542</sup>

### 4.2.3 Inheritance: an expression of family property

The difference between the way in which the participants experienced inheriting from their parents and inheriting from more distant friends and relatives also speaks to notions of family property. While Carol was pleased and surprised by the bequest from her grandfather, she clearly saw herself as the natural final recipient of her parents' resources. In this, she is echoing Stair's view that children have an "interest" in the "goods of their parents" that arises upon the death of the parents.<sup>543</sup> It is this concept of a "deferred community of property"<sup>544</sup> that would be entirely lost if the second of the SLC's proposals – the suggestion that *legitim* be abolished and replaced with a right for dependent children only<sup>545</sup> – were accepted.

A second point relating to family property was raised by Caroline, another participant who was unsure whether or not she had inherited. Her comments spoke not to the interest individual children have in their parents' property, but to the collective interest family members have in a deceased ascendant's property:

Officially? Like, in a will or...Like I have inherited some money when my grandmother died, but it wasn't left officially to me, my mum just gave me some of the money that was left...so I suppose that was...I don't know, it wasn't...it was left obviously all to my mum and she just chose to give me some...

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<sup>540</sup> Although Mary was of retirement age, she was not in the 65+ cohort.

<sup>541</sup> Gordon and June reported small inheritances. June would have got a third of her father's estate, which was instead distributed amongst his six grandchildren to the tune of "a few hundred pounds to each child."

<sup>542</sup> The six other participants in Group 7 indicated that their experience was similar to that of Bill, while Joan, John, Gordon and Tom specifically made reference to their parents' limited means.

<sup>543</sup> Stair, *Institutions*, 1.5.7.

<sup>544</sup> Hiram, H, "Reforming succession law: legal rights," (2008) 12 *Edinburgh Law Review* 81 at 84.

<sup>545</sup> 2009 Report at 3.65.

Unlike Mary, who felt that she had not inherited, Caroline felt she had inherited, even although she plainly had not. In a factually similar scenario, Laura stated categorically that she had inherited over £30,000 from her granny, before later clarifying that her grandmother had left her estate to be split equally between Laura's mum and uncle, and that Laura's mum had then chosen to share it with her children. In both cases, the simple fact of receiving money upon the death of an elderly family relative was experienced as inheritance, and was based on the view that the elderly relative would have wanted the resources to be used for the good of the family as a whole. Other participants echoed this view, but from the perspective of the person planning the bequest, conjecturing that they provided for their children on the assumption that it would benefit grandchildren as well.

The perception that Carol, Simon and several others had, that their inheritances were unremarkable, provided valuable data about expectations and suggested that, despite what they may claim, people expect to inherit from their parents. In contrast to the surprise and pleasure the participants experienced at being "remembered" by other relatives, those who had inherited from their parents appeared regard it as a simple inevitability.

### 4.3 Expectation

The dialogue that flowed from the opening question in the focus groups raised many issues that became the "building blocks" of theories.<sup>546</sup> These building blocks were generated through the process of coding, discussed in Chapter 2.<sup>547</sup> As part of the first step in the process of data analysis, known as "initial" or "open" coding, many codes were noted in the margin of the transcripts. Words noted in the margins in relation to the opening question on experience of inheritance include: entitlement, family property, sharing, anger, disappointment, assumption, inevitability, expectation, and so forth. When this was complete, I moved on to "focused" or "selective" coding, whereby I assigned thematic codes or categories.<sup>548</sup> One of the earliest and most commonly recurring codes to emerge was "expectation" and I

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<sup>546</sup> Peters (2014) at 5.

<sup>547</sup> Ch 2, 2.9.

<sup>548</sup> See Appendix 3.

consolidated terms such as anger, disappointment, and entitlement under this heading.

The emergence of expectation as a key thematic code was unsurprising for two reasons: firstly, without expectation, no sense of disinheritance arises; and, secondly, expectation has already been shown to be a highly contentious issue in other studies.<sup>549</sup> Rowlingson, for example, observed that participants demonstrated a “reluctance” to use the word “expect” in relation to inheritance, which, she posited, related to a view that people should not see inheritance as a right.<sup>550</sup> However, while dominant social mores precluded participants from openly admitting to expecting an inheritance, many clearly did and expectation was a constant thread in the discussions.

Stereotypically, expectation is viewed as residing in the “grasping” adult child, from whom the “vulnerable” parent requires protection. This trope is deeply entrenched and many participants were keen to distance themselves from it. However, without wishing to minimise instances of financial abuse of elderly relatives by family members,<sup>551</sup> several studies have shown that adult children demonstrated no desire to see their parents curtail their living standards in order to leave an inheritance.<sup>552</sup> Instead, children’s expectations arise from the belief that, where assets remain, they have a claim on these assets.

Finally, one of the key findings in relation to expectation was that it existed as much, if not more, in the minds of the participants who were parents, who were, for the large part, clear that they expected to be able to leave assets to their children. This was particularly evident when parents saw this expectation threatened, either by the prospect of paying for elder care or by the idea of a spouse remarrying. Both of these

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<sup>549</sup> Rowlingson and McKay (2005), 4; Finch and Mason (2000), 60.

<sup>550</sup> Rowlingson and McKay (2005), 4.

<sup>551</sup> Financial abuse of elderly relatives is considered to be an under-reported phenomenon. See for, example, Equality Scotland, *Elder Abuse – Raising Awareness*, (2014), available at <http://www.equalityscotland.com/5/22/News/Elder-Abuse-Raising-Awareness.html>.

<sup>552</sup> See for example, Finch and Mason (2000), 120.

questions will be addressed later in this thesis,<sup>553</sup> while this chapter will first concentrate on expectation from the perspective of the putative beneficiary.<sup>554</sup>

### 4.3.1 Tacit versus explicit expectation

As discussed above, inheriting from parents was viewed more as an inevitability than the result of an active bequest. Carol's explanation of her inheritance ("well, I'm an only child and my mother and father have both passed away") was mirrored by other participants explaining why they had – or had not (yet) – inherited. Consider the following excerpt from a discussion group comprising media professionals:

Interviewer: Have you ever inherited?

Simon: You mean from my parents, kind of thing?

Interviewer: From anybody really.

Simon: Yes, yes. I was effectively an only child so I inherited my parent's estate, 20 years ago or so, which included a house in Cornwall.

Interviewer: What about yourself?

Gillian: No, I've still got my mum and dad but we've just gone through having to sell their house because they've both had to go into residential care. So whilst we've still got my mum and dad we've just waved our inheritance goodbye because basically they are allowed to keep 14k each.

While the language used by these participants invited tacit acknowledgement of the inevitability of assets passing from parent to child, these same participants would likely be askance at the suggestion they expected or had expected an inheritance.

Participants' difficulty with explicitly acknowledging that they held expectations centred on an understanding of expectation as a byword for entitlement. This understanding proved difficult to displace and, despite attempts to ask participants whether they thought they might inherit – rather than whether they expected to inherit – they almost inevitably interpreted the question in terms of expectation.

Consequently, it was often the case that, as soon as the discussion entered the terrain of how people thought their parents might dispose of their assets – or indeed how any parent might dispose of her assets – one participant would take the opportunity to

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<sup>553</sup> See section 4.7 and Chapter 5 respectively.

<sup>554</sup> It is worth pointing out that since we are all potential beneficiaries, discussion viewed from this perspective, when not relating to individual cases, invariably means the perspective of wider society (a point made in Reid et al. (2015), 447).

assert her disapproval of expectation.<sup>555</sup> In a discussion as to whether the parents of the disinherited child in scenario 2 had behaved fairly, Kathleen interjected to comment on her family:

My mum and dad are late 70s, there's three of us, and I don't think it's ever even been discussed. No-one cares, we just care about their health... It's their money, they've worked, they've bought this house... One brother had a slight issue with it, but we just told him to shut it (laughter). They deserved it.

Such statements had a powerful effect, often prompting other group members to convey that they too rejected the greed and cupidity that were felt to underpin expectation. For example, Gillian, who had previously remarked that she had waved her inheritance goodbye when her parents went into a nursing home, was quick to clarify that she certainly did not consider herself entitled to inherit:

Gillian: I don't think anyone has a right to anything.

Simon: I think that's absolutely spot on.

Kathleen: You are absolutely spot on, nobody has the right to anything.

Clearly, while there is a difference between expecting a share of anything that is “left over” and expecting parents to forego their own happiness in order to provide an inheritance, the two were often confused in the minds of participants.

### 4.3.2 Direct personal experience

It is noteworthy that those who condemned expectation the most roundly did not themselves appear to have had any experience of “missing out” on an inheritance. Moira, a financial officer from Glasgow, is a case in point. Moira recounted how upset her mother had been when Moira's aunt left her entire estate to charity. Moira did not share her mother's sense of having been wronged, and indeed seemed amused by her mother's reaction:

I know that one of my relatives decided that she would leave all of her money, including the value of her house, to the cat and dog home. And you just hear of these things happening and you actually don't believe it ... it does. It was on my mum's side of the family and she was livid. She was really livid. You know, *there were people in the family who could have done with money...* and

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<sup>555</sup> This occurred in Groups 2, 3, 4, 5 and 6.

all that kind of thing ... and you are kind of going but it was hers! (laughs) and it was her decision to split it that way. You know, and if that's what she wanted to do with it, then good on her.

Not being directly involved, Moira simply viewed the story through conventional narratives that prize testamentary freedom and condemn expectation.

In contrast, Maureen, who had had two difficult inheritance experiences, including one where she “lost out” to her father’s second wife, placed far more emphasis on the importance of “fairness” and the potential emotional fallout from thwarted expectations. In a follow-up interview, Maureen shared her reflections on her fellow participants’ reactions:

I noticed that in my focus group. People seemed to talk about it as a detached thing, which is fine. You know, if your new stepmother takes all the rings and the money, well that would be her entitlement. They’ve clearly never had a stepmother take the money and the rings, you know (laughs).

Participants like Moira and Simon appear to have inherited from their parents without incident and, as such, had not had to consider whether they harboured any expectations with regard to their parents’ estates or whether the rules were “fair.” In contrast, the experiences of participants such as Maureen provide meaningful insight into the potentially less desirable consequences of both the current legislative framework and the reform proposals.

### 4.3.3 A generational divide

A final point to be made with regard to expectation relates to whether a rejection of expectation – arguably also a rejection of family obligation – is particular to a specific generation. Moira’s tone in discussing her mother’s anger appeared to suggest that, to her mind, her mother’s outrage encapsulated the reactionary view of an older generation, a sentiment shared by Gordon. Having ensured that his only son – unable to work due to his bipolar disorder – would be adequately provided for, Gordon planned to leave the balance of his estate to charity, as opposed to other relatives. In discussing his decision, Gordon remarked that his mother would “really disapprove” of what he planned to do, as she had “a very narrow definition of where our caring should stop,” believing blood to be thicker than water.

As a qualitative study, this project was not designed to measure the prevalence of particular attitudes amongst particular generational cohorts. Nonetheless, Bill, who at 80 was likely a member of the same generation as Moira's and Gordon's parents, was utterly incredulous that people were allowed to do as they wished with their money:

Bill: I know an old lady the now, she stays along the road, according to my wife, she's hersel' and a wee dug. And I reckon that's where her money's goin'. The dog home. And I'll tell you, she's got a lot of money. Because she used to have a wee shop. We knew them personally when they had the shop. And I still know Ivy. Now, that goin' to a dog home?! (incredulous)

Of course, the difference in the worldview expressed by Bill (who would have preferred the money to go to a distant relative) and that expressed by Moira and Gordon, could be explained by factors other than the much-touted individualism of the babyboomer generation. Certainly, the desire to provide for family was not unique to the older generation, with parents of young children being amongst the least equivocal about the existence of parental duty to provide for children. This might suggest, as has been noted by Rowlingson and McKay, that attitudes reflect not only generational differences, but also the effects of the ageing process, with attitudes to the children's entitlement ebbing and flowing in line with an individual's priorities over the course of her lifetime.<sup>556</sup>

#### 4.4 Testamentary Freedom

A second thematic code to emerge, and one that is closely linked to expectation, was testamentary freedom. The two are linked insofar as one of the principal objections to expectation was that it encroached on the individual's right to choose how to dispose of her assets. A legal share for children gives legal force to expectation and can, therefore, be viewed as an affront to testamentary freedom. This was a significant concern for participants, as testamentary freedom was widely viewed in a positive light. In a sense, for many participants, their support for testamentary freedom was the corollary to their contempt for expectation.

One of the difficulties in discussing testamentary freedom and forced heirship is that

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<sup>556</sup> Rowlingson and McKay (2005), 42.

they are often presented as being diametrically opposed. In their absolute form, testamentary freedom and forced heirship provisions are of course irreconcilable, but Scottish legal rights have only ever constituted a partial encroachment on that freedom.<sup>557</sup> Furthermore, most people already accept limitations on their freedom to dispose of their assets: in life, few contest the duty to aliment children, or even to pay some form of income tax, while in death, spousal support through prior rights and the *jus relict/relictæ* has wide support. It may be more helpful not to view testamentary freedom and forced heirship provisions as opposites in constant tension, but to ask whether the two can co-exist in a manner that is acceptable to the majority of people.

Overall, for the majority of participants these two competing concepts could be balanced. While testamentary freedom was prized, commitment to the concept varied significantly across a spectrum of contexts. This is not to suggest that the participants were fickle in their views, but rather that they were responsive to factors other than the inherent value of testamentary freedom. Two factors in particular influenced the participants in their decision-making process: their perception of the “fairness” of the outcome and their perception of the “deservingness” of the child. An “undeserving” child galvanised their commitment to testamentary freedom, while an “unfair” outcome saw some retreat from initially robust support.

#### 4.4.1 The “unfair” outcome

Throughout the discussions, a number of participants struggled to reconcile their conceptions of “fairness” with their belief in testamentary freedom. This was particularly evident when they were confronted with real-life scenarios. A striking example of this is provided by a story Catriona related to her fellow participants in Group 5. Catriona’s mother-in-law had acted as the executor for her aunt’s estate but, in fulfilling her role, engineered a change to the distribution of her aunt’s assets in order to achieve a “fairer” outcome. When the aunt died, pre-deceased by her own children but leaving behind two grandsons, she bequeathed the entire estate to one of the two grandsons. Catriona’s mother-in-law felt such an outcome was unacceptable and intervened to ensure that the estate was split equally between the two grandchildren:

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<sup>557</sup> Legal rights long predate testamentary freedom in Scotland, see Gardner (1928) at 87. For further discussion of the history of legal rights, see also Reid (2015), 371-374.

Interviewer: Did it cause a lot of bad blood then?

Catriona: Well, Oliver's parents managed to persuade the child that although that was their wishes that maybe wasn't the right thing to do, so they eventually managed to find a way to explain to his brother that he was going to give him half of what he'd got...that was the outcome.

Interviewer: So it was settled rather than...

Catriona: Rather than it being made explicit to one that he got nothing, they managed to kind of fluff over it.

Interviewer: Do you know why the grandparents did that?

Catriona: I think they just preferred him (laughs).

Sally: Wow.

Catriona: Hideous.

Lucy: Brutal.

Although the participants in Group 5 later expressed support for testamentary freedom, the mother-in-law's actions attracted no opprobrium: for these participants, when the testator failed to act fairly, she lost the right to have her wishes respected. This is not to criticise the participants, but to stress that, as families struggle to negotiate the vagaries of life and smooth the edges of conflict, theoretical principles seem less important.<sup>558</sup>

In contrast, in speculating as to why a parent in a fictitious scenario had disinherited a child, it was virtually always assumed that the testator was kind and even-handed, untainted by human failing and impervious to the entrenched family politics of "real" families. Andy, for example, asserted that those who complained about not getting "their" inheritance were "being bitchy"; however, when recounting his own experiences, he later asserted that he was "very bitter" that his mother, who was separated from his father, had "ended up with about £15,000 more than I thought she deserved" at his expense.<sup>559</sup> While reflecting on scenarios from which they were emotionally detached, testamentary freedom appeared an uncontroversial value;

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<sup>558</sup> In the follow-up interview conducted with Maureen, she related that her aunt used different coloured stickers to designate which item was intended for which of her two children. Maureen explained that she had at times rearranged these stickers to avoid family tensions between the siblings and to counter her aunt's vindictive behaviour: "and so last time I saw her I had to change some of the stickers. Of course I did."

<sup>559</sup> Andy's story was somewhat unclear, and it was not clear whether the mother received more through the operation of prior rights or through a family agreement, but the point remains that, when confronted with real life family disputes, participants were unsurprisingly less objective and their commitment to testamentary freedom depended on who they thought was in the right.

however, when reflecting on personal stories, the complexity of family relationships and old wounds came more readily to the fore and views were less absolute. It is precisely this sort of nuance that cannot be captured in a questionnaire-based survey, but which is invaluable in understanding societal expectations.

#### 4.4.2 The undeserving child

The second factor to influence the participants' attachment to testamentary freedom was the presence of a particularly undeserving child. The fictitious undeserving child assumed many guises, but most commonly presented as a drug addict, with several participants stating that it would be reasonable for parents to exclude an addict child,<sup>560</sup> as "you know what they are going to do with it." However, while the spectre of the undeserving heir loomed large, it appeared to be the exception rather than the norm: of the 37 participants, two related second-hand stories of addiction and one related a story of a "pure evil" stepbrother who had allegedly repeatedly "battered his dad, tried to kill him;" for others, family disputes appeared to cover the more prosaic territory of favouritism and jealousy.

What was striking about the participants' comments on testamentary freedom was that they defended not the parents' right to dispose of their assets as they saw fit, but the right to have their superior judgment on matters relating to their children respected. With the exception of Simon, nobody suggested that parents might simply want to leave their assets to a charity or a friend. Instead, participants seemed to start from the premise that the parents would not have disinherited their children unless they had done something truly terrible or required protection from themselves.

In scenario 1, for example, in which the testator left her entire estate to her second husband, the Group 2 participants did not focus on reasons that might have led the deceased to provide for her spouse, but instead on identifying why she had not provided for a child:

Carol: I would wonder why a parent would cut a child out of a will. To me I would wonder why.

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<sup>560</sup> Excluding a drug addict was raised by participants in both pilot projects and in Groups 1,4 and 6.

In other words, Carol could not conceive of this as an unremarkable decision, simply reflecting an average testator's wishes. It deviated so far from her understanding of social norms that she could only conceptualise it as indicative of a severe relationship breakdown. In terms of potential triggers for such a relationship breakdown, the bar was set high, with Kathleen positing – half in jest – that it had perhaps been discovered that the child who had been disinherited in scenario 2 had been plotting to kill the parents.

While the majority of the participants vacillated in their view depending on the facts at hand, three were prepared to adopt a categorical position. In Group 3, Simon and Kathleen were ardent supporters of testamentary freedom, and given that it enjoyed wide support, their view tended to ride roughshod over any dissent on the matter. The following is an excerpt from a discussion on scenario 2, in which the parents had disinherited one of their three children, whom they believed had hurt and humiliated them:

Interviewer: Do you think the parents behaved fairly?

Simon: My answer is I'm not interested in judging whether they've behaved fairly. It's none of my business. If that's what they've decided and I think they should be allowed to decide how they wish.

Voices: Yes, yes. I agree.

Kevin: I think if all children have a legal right to inheritance...Should that be overridden in circumstances like this? I don't know (sounding unconvinced).

Voice: It's a really difficult one...

Gillian: Today I've fallen out with this daughter so I change my will. In five years time we're all happy families again and I forgot to change my will back...

Kathleen: Well, it's your own fault. I just think the will stays. Honestly, I think you should give people more credit for what they choose and I don't think children have a say in it. She's highly successful, is that also extremely wealthy, and they know that, and the other two maybe aren't. And she's not been very supportive, then, no, sorry.

Simon: Go, Kathleen! (laughter)

At the other end of the spectrum, John was the only participant to embrace forced heirship wholeheartedly. As will be discussed below, many participants ultimately came down on the side of maintaining a legal share for children, but not without first expressing some angst that their position offended the principle of testamentary freedom. John, however, was unconcerned by this:

Even if I did feel antipathy towards them I would hope, I would want it to be, that I would not be able to do anything against my wife, my children or my grandchildren, to exclude someone because of a dislike, that should not be allowed, you should not be allowed to disqualify a child or a grandchild...or a good friend from your will.

What was particularly striking was that John suggested his views on family obligation stemmed from his lack of education. In response to comments Gordon made on the ills of inheritance, he remarked, “I know, I agree that I’m not an intellectual and therefore probably things bypass my thinking process.”

The attitudes the participants displayed towards testamentary freedom were similar to those identified in the NatCen study. In their discussion of attitudes to testamentary freedom, the NatCen researchers identified support for three main views: complete testamentary freedom, the ability to challenge in some cases, and the ability to challenge in all cases. Those who supported absolute testamentary freedom felt that “free will was more important than relative need or the responsibility to provide for family;” those who supported circumstantial ability to challenge prioritised fairness and avoiding “hurt or harm;” and, those who accepted an ability to challenge in all circumstances prioritised “maintaining lineage” and retaining property within the family “as a way of keeping the family together.”<sup>561</sup>

While these reasons are unsurprising, they differ slightly from those expressed in my research insofar as my sample included no reference to lineage and, as explained above, the participants in my study did not necessarily conceptualise free will as being more important than family obligation.<sup>562</sup> There is no doubt that free will was important, but certain participants primarily saw it as a means of allowing testators to exercise their family obligations in a particularly judicious fashion, as opposed to allowing them free rein to do as they pleased. In this sense inheritance was an act of parenting: testators had to protect drug addicts from themselves and ensure that “bad” children were not rewarded for their misdemeanours.

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<sup>561</sup> NatCen study (2010), 34-36.

<sup>562</sup> The slight difference in attitudes might partly be explained by the differences in the two countries’ legal systems: testamentary freedom in England is not tempered by legal rights and so testamentary freedom is absolute (subject to a claim under the Inheritance (Provision for Family and Dependents) Act 1975).

Of course, while scenarios of abusive children (or indeed spouses) remain an important mental stumbling block to embracing automatic entitlements, a relatively simple solution does present itself. A number of jurisdictions, including Scotland, have provisions to prevent a killer inheriting from his victim.<sup>563</sup> In some jurisdictions, this principle has been extended to include “lesser” crimes of neglect and abandonment, either towards children or towards vulnerable adults.<sup>564</sup> Eight US states have also enacted elder abuse disinheritance statutes.<sup>565</sup> While undoubtedly requiring further examination,<sup>566</sup> such provisions have an obvious appeal insofar as they operate by automatically including children, excluding them only where justified, as opposed to excluding all children for fear of including an “unworthy” heir. This would preserve Scotland’s historic protection of children’s rights whilst mitigating the very real concern expressed by certain participants that automatic entitlements allow unworthy heirs to inherit.

In conclusion, on close analysis, it appeared that most participants objected more strongly to the “wrong” child receiving an inheritance than they did to parents being forced to make some provision for their children. In light of this, ensuring that an undeserving child never inherits by removing inheritance rights from all children seems to be a somewhat extreme response.

#### 4.4.3 *Legitim*

While the views discussed above relate to participants’ views on testamentary freedom in general, an attempt was made to focus on *legitim* in particular. Dot Reid has referred to legal rights as the “best kept secret”<sup>567</sup> in Scots law and indeed few participants appeared to have heard of such a right. Certainly, there was no sense that this was an issue the participants had considered at length and, perhaps because of this, views were measured, even reticent. Furthermore, having explored the arguments for and against testamentary freedom, some participants appeared reluctant to

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<sup>563</sup> Succession (Scotland) Act 2016 s.12.

<sup>564</sup> See, for example, Uniform Probate Code s 2-114.

<sup>565</sup> Hunt, T, “Disincentivizing elder abuse through disinheritance: revamping California Probate Code s259 and using it as a model,” (2014) 2 *BYU Law Review* 445 at 446.

<sup>566</sup> As will be discussed in Chapter 6, there are not inconsiderable downsides to the use of discretion.

<sup>567</sup> Reid (2008) at 396.

comment on *legitim*, perhaps because they understood the system would, at times, inevitably deliver the “wrong” outcome. Given their obvious reluctance to pronounce a definitive opinion, it appeared unethical to press them to do so.

Nevertheless, a handful of participants did engage directly with the question and, while some adamantly maintained that each case turned on its own merits,<sup>568</sup> those who accepted the need for a generally applicable rule concluded, on balance, that the benefits of legal rights outweighed the disadvantages. Caroline’s comments are typical:<sup>569</sup>

For every case that this is a good idea for, there will also be a couple it’s a bad idea for. Someone who has been a terrible, terrible child and done awful things, unfortunately they are still entitled to the money who should’ve been cut out. Sometimes you have to sacrifice a few cases where it’s not a good idea in order for it to be for most people. So it’s probably a good thing.

For some participants, reaching this conclusion was more difficult. Ron reported that he had “a fairly hard attitude” on certain questions relating to inheritance, although he was confident in his assessments as he considered his views to flow from “objective fairness,” rather than emotion. Early on in the conversation, he stated his preference for testamentary freedom, saying that it was “always better if people can decide for themselves how they want it to be.” Nevertheless, when pushed to decide whether it was better to have some form of automatic share as opposed to unfettered freedom, he eventually came down on the side of a legal share:

Interviewer: Given you have to have some rule do you think it’s fair enough that you have some provision?

Ron: I fully understand the need for it because if you didn’t have it I think you’d have some pretty dire situations, but you’ve got remember that some people can handle things more rationally than others, you’ve got the situation where spite starts to come in, all sorts of thing. On balance, I think you do need a safety net but personally I would like to be in control of how things are disbursed.

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<sup>568</sup> Claire, Andy, Catriona.

<sup>569</sup> Carol expressed a similar view.

Ron, like most people, viewed himself as best placed to regulate his own life. Indeed, for the majority of participants, the rule was needed for other people: all considered themselves to be even-handed and fair-minded.

The above is not to suggest that every participant would support legal rights, there is certainly room to believe that Simon and Kathleen would reject the concept.<sup>570</sup> However, time constraints and the natural flow of conversation did not allow every participant to be asked to reflect on the question.

In summary, it cannot be concluded that participants consider testators to have an absolute duty not to disinherit their children, but it is equally clear that few—if any—of the participants would consider disinheriting their own children. Gladys, for example, observed, “I don’t know. I can’t conceive of ever cutting out my children completely,” while Ron remarked he couldn’t “imagine a situation where you would disown your own child to that point that you wouldn’t recognise genuine need.” In this my own findings mirror the conclusions that Dot Reid drew in her analysis of the available research, namely that “there is little to suggest that Scottish parents would consider themselves currently under a ‘legal disability’ in being unable to disinherit their children”.<sup>571</sup>

#### 4.5 The testator’s duty

When expectation and entitlement were examined from the perspective of the potential recipient, two strands of consistent but conflicting thought emerged. Firstly, testators were free to dispose of their assets as they pleased and were under no obligation to curtail their spending in order to provide an inheritance. However, although almost all participants supported testamentary freedom, some also implicitly expressed the view that it should be respected only as long as it was exercised judiciously and fairly. This second narrative was based on an expectation that, unless there were sound reasons to do otherwise, parents would pass at least some assets to their children upon the death of the second parent.

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<sup>570</sup> Simon and Kathleen, along with Gillian and Olga, were recorded as saying that a will should stand when discussing testamentary freedom in general.

<sup>571</sup> Reid (2008) at 405.

This expectation exists in part as a corollary to the normative view that a parent has a duty towards his children. Historically, this duty was considered self-evident, with Stair freely condemning those who breached it as “worse than infidels.”<sup>572</sup> However, in contemporary society, the language of duty was approached with considerable caution as, like forced heirship, duty is a concept that can offend personal autonomy. Furthermore, in recounting their personal decision to provide bequests for their children, most participants identified their motivations as love and a desire to provide, as opposed to any sense of duty. As what they felt was the “right” thing to do corresponded with what they wanted to do, the question of duty did not often explicitly arise in their retelling of their own will-making process. Nevertheless, a sense of duty clearly existed: while participants defended testamentary freedom, many also disapproved of the behaviour of the characters in the scenarios for failing in what can only be considered their implicit duty.

Although it might have been anticipated that there would be as many conceptions of duty as there were participants, there was a great deal of commonality in the central views expressed. Four main duties were identified: the duty to make a will; the duty to treat all members of a given class of beneficiaries equally; the duty to provide for family; and, the duty to prioritise family. These duties, while enjoying wide support, were, of course, not unanimously agreed upon; however, where they were supported, they were often also viewed as part of the greater duty to be a good parent.

#### 4.5.1 The duty to make a will

One of the first duties to emerge was the duty an individual has to take the time to make a will. A total of 24 (65%) of the 37 participants in the study had wills and there was a clear sense that this was the reasonable and responsible path to follow. While there was a general consensus that having a will was a “good” thing, a small but significant group were nonetheless relaxed about not having a will, as they were confident the “law” would sort it out for them. In stark contrast to this group, another similarly-sized group was quite stern about what they viewed as people’s irresponsibility in not having a will.

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<sup>572</sup> Stair, *Institutions*, 1.5.7.

When Group 1 was presented with scenario 4 which involved a man dying intestate, survived by a wife he had met five years before his death and two adult children from his first marriage, the prevailing attitude was that the deceased would be upset by the exclusion of his children by the statutory regime but that he had only himself to blame.<sup>573</sup> Consequently, they had little sympathy for him and were instead bemused as to how somebody could have allowed such a situation to occur:

Tom: What's sticking out a mile is that from two people who are supposedly switched on and have a bit of money, they should have been taking professional advice, they should be going to a meeting with the lawyer and the financial advisor and saying here's the situation, we have children, and their question should be, do you want to make provision for the children. And the answer usually would be oh yes, so you write that into the will and you don't have this scenario here where the children are having to make this challenge. That's my take on it.

Although fellow participant John was empathetic to the fictitious deceased, pointing out that people can get swamped by daily life without being negligent or foolish, his was the minority view in this group.<sup>574</sup>

Maureen, having been in this situation herself, expressed a similar view, albeit in less strident tones. Her explanation of the details of her father's will was unclear, but it appears that a will that was originally drafted to benefit his first wife—Maureen's mother—ultimately benefited his second wife. Maureen expressed frustration that her father had not reacted to his changed circumstances and updated his will accordingly:

There was £10,000 that my brother and I both got immediately, which was great, lovely, and the rest was in life interest and trust and it was really uncomfortable then and I think she [Maureen's step-mother] felt really uncomfortable and we had some difficult conversations. She was very stressed about it, I was quite stressed about it as well. I thought my dad was very lazy and not paid attention to his business and I think he should have.

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<sup>573</sup> They clearly felt that it would not be what he would have chosen had he given it some thought.

<sup>574</sup> Gordon expressed a similar view on scenario 1, where an estate passed to a second husband in a will and then to his children on intestacy. Gordon was unequivocal that, although this was not the outcome the average parent would want, the mother only had herself to blame: "That's just how the cookie crumbles. It's anticipatable and wasn't anticipated." He did not consider the "fairness" of the law which allowed Kate's children to pay the price for her oversight.

For Maureen, her father had failed in his duty: it was his duty, as a partner and a father, to anticipate and manage what she interpreted as having been a foreseeable problem.

The participants all appeared to feel that writing a will was something they *should* do, with many expressing embarrassment that they had not yet done so. For example, despite all efforts to provide reassurance, Lauren admonished herself for not having written a will, insisting, “but it’s not good, you should have it sorted”. For some participants this related to control and to ensuring an unnecessary burden did not fall on surviving relatives; however, for many it also—and sometimes exclusively—related to parenting. Indeed, while many participants discussed inheritance in terms of providing for their children, only two referenced the need to protect their spouse as well as their children. This is not to say that the other spouses did not care for each other, rather that they did not consider assets passing from one spouse to another as constituting an inheritance. Instead, they simply assumed that what once belonged to both parties would become the sole property of the surviving spouse.<sup>575</sup> As such, for the participants, writing a will was primarily to control what would happen when *both* parties died and, in the case of all the participants in this study, this involved making sure it went to their children.

While notions of parenting were present in the minds of older participants, providing for children was a particularly acute concern for younger participants. Sally, for example, explained how she and her husband were one day struck by the realisation that they needed to write a will to ensure their children would be provided for if they died:

[A]nd we both thought, at exactly the same time, we might die tonight and we both thought we’ve got to do something about this as we’ll probably go off on our own more and more as the kids get older and so, just in case, the worst case scenario, we need to know that they are OK, well not OK, but as provided for as we can if that happened basically. It was horrible.

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<sup>575</sup> This confirms similar findings in other studies. See, for example, Finch and Mason (2000), 71; Rowlingson and McKay (2005), 7-11; and Munro, M, “Housing wealth and inheritance” (1988) 17 *Journal of Social Policy* 417 at 432.

Ironically, this same desire to protect their children was also cited by some participants as a reason for not having a will. Sally was the only one of the seven participants in the 30-40 age bracket to have a will and, of the remaining six, three specifically stated that they did not have a will as they could not decide who to appoint guardian of their children:

Interviewer: Do you have a will at all?

Catrina: No, it's hilarious, we're both chartered accountants. We don't but the reason we've not really felt any urgency is that every time we've looked at what the default position would be we're probably quite happy with that... But having said that, for some reason, Oliver in particular has delayed it because he seems to think we have to put in it who will look after the kids.

Lucy: That's exactly why we haven't done ours! That's exactly why we haven't done ours!

Catrina: I don't know, maybe that's a barrier for a lot of people.

Laura provided a similar explanation, citing a lack of time and endlessly “humming and hawing” over guardianship.

Given that the discussion in Group 1 had focused primarily on the transmission of property, these comments—where assets were so clearly secondary to care—were initially surprising. However, the difference can likely be explained by the age of the participants involved: these women were all in their 30s and all had young children, whereas those with whom I had first spoken were in their late 50s or 60s. While the latter were more concerned with providing support and demonstrating affection, the former viewed a will first and foremost as a means of establishing who would assume the parental role.

This is not to say that the transmission of property was absent from the minds of the participants in the younger age cohort. However, whereas they might have been expected to consider the role of property in providing aliment for their young children, they appeared to view it in the same way as the older parents, namely as a means of providing a financial cushion for the children when they reached adulthood. Caroline and Laura, for example, both stated that everything would be split between their two children, but they both specified that this would not be accessible to the

children until they reached the age of majority, appearing to presume that grandparents, aunts and uncles would assume the cost of raising them until that point.

The commentary surrounding the duty to provide for young children is important as it suggests that the SLC's proposal may be out of line with public attitudes. While there is no doubt that parents want to ensure that their dependent children are provided for, they see this being achieved through life insurance policies<sup>576</sup> and appointing family members as guardians. The purpose of bequeathing assets to a young child is the same as bequeathing assets to an adult child: a token of love and a “cushion” against future financial hardship.

#### 4.5.2 The duty to treat children equally

While Scots law provides siblings with equal baseline protection from disinheritance through *legitim*, no legal requirement mandates parents to provide equally for their children. Nevertheless, a strong normative requirement does appear to operate. Indeed, based on the findings of their English study, Finch and Mason reported that “the impulse to equal treatment” is “almost invariable” in relationships of direct descent.<sup>577</sup> As will be discussed below, my research findings suggest that Scottish parents experience a similar impulse, with all of the participants who had children reporting either that their will already provided equally for their children or that, when they wrote a will, it would provide equally for their children.

This does not mean that the participants felt that *all* parents had a duty to provide equally for their children. Certainly, when confronted with scenario 2, where one child had provided considerably more support to her parents than her sisters had, the majority of participants had no difficulty with the “deserving” child being given the lion's share of the parents' estates. However, although the participants respected the fictitious parents' right to differentiate, they did not, in practice, grant themselves the same degree of latitude.

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<sup>576</sup> Lucy explained that she and her husband cancelled their appointment to get wills and decided to put the money towards life insurance instead.

<sup>577</sup> Finch and Mason (2000), 77. See also NatCen study (2010), 9.

In this the results were similar to my findings on disinheritance where participants recognised that parents had a moral right to disinherit terrible children, but struggled to imagine a scenario where they would avail themselves of this discretion. While disinheritance is absolute – and it is therefore understandable that parents wished to avoid it – it is perhaps surprising that they were so reluctant to differentiate between children in their own family life. After all, at first blush, differentiation is not necessarily indicative of a broken relationship. Indeed, participants identified four categories of potentially acceptable reasons for differentiating between children, each of which is examined below. Nevertheless, while these grounds were *prima facie* uncontroversial, participants found it difficult, if not impossible, to differentiate between their own children.

#### 4.5.2.1 Equality of outcome

Although equal treatment is the general rule for most people, equality of outcome is also commonly considered an acceptable means of achieving fairness.<sup>578</sup> The following excerpt of a discussion between Tom and John provides examples of two opposing views on the question:

John: I hinted at that. I think that in spite of that [referring to family dispute in scenario 2] children should still be treated the same.

Tom: I take the opposite view. If someone's been nasty to their parents and the rest of the family and is highly successful in their own right I would make proportionate differentials. End of story (Laughs).

John: That's the business head talking

Tom: It probably is actually. It's probably a wee bit more hard-headed than what you're saying about everyone getting treated equally. I don't agree with that. For the same reason, if somebody has an illness or something, I've got something in my own family like that, I would think that I would make a provision on that side of things, knowing that their need was greater.

John: How good or how bad your children are, that's an opinion, and I wouldn't like to trust my opinions too much so what I'm saying is treat them all equally.

These two fundamentally disagreed, with John arguing that children should inherit purely based on status, in part to protect them from the whims of a vindictive or mistaken testator. Tom, however, viewed decisions on testation as the sole

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<sup>578</sup> See, for example, Finch and Mason (2000), 51.

prerogative of the testator and, when asked whether his children would understand his view, he replied “they’ll bloody well have to (laughs). I’m in charge. I’m in charge”.

It is noteworthy that, although Tom placed the emphasis on being in charge when he spoke of his own family, his aim was not to establish his dominance, but to protect the interests of a vulnerable family member and to create a certain equality of outcome. He was motivated by his conception of good parenting, as opposed to signalling which child he preferred. Interestingly, although Tom stated that he would make more generous provision for a child with greater need—and acknowledged that he had such a situation in his family—he also stated that his own estate would be split equally between his children. This is not to say that Tom does not plan to amend his will, or that he has not made other non-testamentary provision, but simply to stress that there is a strong bias in favour of equal treatment which is not disregarded lightly even when there is valid reason for doing so.

June and Gordon were also of the view that equality of outcome was more important than providing equal shares:

June: Do you remember when my brother-in-law said to you, as if it were taken for granted, that he was going to leave his money equally to each of his three children and we said don’t do that. He’s got a son who’s a banker, he’s a director of Credit Suisse...

Gordon...ridiculous!

June...and a wee girl who had an illness, in fact the other one...No, leave him a token something but it’s the girls that need the money.

June and Gordon’s example is interesting as it touches not only on mitigating inequality of outcome based on disability or illness, but also inequality based on different economic success.

While Gordon and June had no qualms about differentiating between children based on material wealth (regardless of illness), other participants flagged it as a question that could generate tension. Lucy related that her parents do not always tell her older brother – who has had a very financially successful career – about financial assistance they provide to her and her younger brother. She remarked that her brother had “always been kind of obsessed with exactly what’s fair”, refusing to accept his

parents' belief that you "do not need to provide equally for people...[as long as]...there is an overall fairness." Her brother instead believed that he had "worked hard to put himself in the position that he's in" and should therefore "benefit equally" from his parents' largesse.

Perhaps the most surprising example of unequal treatment came from Lucy's husband Chris. Chris was raised by his grandparents, who left their house to Chris and his father, making only a small cash provision for Chris's uncle. The decision caused irreparable damage to family relations and Chris's father and uncle have not spoken since the death of their parents, some 20 years ago. Chris, who throughout the interview showed considerable sensitivity to issues of family conflict, nevertheless seemed somewhat at a loss as to why a grudge had been held for so long. Although his uncle was left "something like £2000" while he and his father were left a house that was worth £160,000 15 years ago (and £600,000 today) he felt that his gran and granddad were "spot on" as his father's economic needs were greater:

Interviewer: Did it surprise you then that your dad didn't give his brother money.

Chris: Not really. I think my gran and granddad were spot on. Uncle Dave was in the army for 22 years so he has the army pension. So that was always their thinking. I can remember my granddad saying that to me.

Interviewer: And do you think your granddad said it to Uncle Dave.

Chris: I don't think so. I think it came as a bolt from the blue and I think they thought there was more money than there was...It was dead sad. But then again, I say it was dead sad and I find it sad from a kind of general point of view but at the same time my dad and my uncle are ten years apart so they were never close. They were never dead good pals or anything and my dad...Dave was 10 years older, in the army for 22 years, institutionalised, very very different character from my dad. My dad's very laid back and likes sport and likes to drink and has drifted through life...

Chris said that, to this day, his father remained "completely puzzled" by his uncle's attitude and lamented his uncle's refusal to discuss the situation, despite his repeated attempt to bridge relations.

Chris's story speaks again to the sense of expectation that children have that they will inherit, based on status alone, no matter how misplaced or "unreasonable" others may hold that expectation to be. However, his reaction to the story was surprising in that,

while the majority of participants approved of parents having the freedom to decide to “reward” one child, they also understood that the siblings who had “missed out” may not remain equanimous in the face of the perceived slight. Commenting on scenario 2, for example, Olga observed that if the family were already quite “divided” favouring one child could exacerbate tensions.

An Australian study on family litigation suggests these concerns are not unfounded: in 2011, Vines found that cases in which disproportionate costs were found in succession litigation (generally cases where mediation had failed) were most likely to occur in disputes between siblings.<sup>579</sup> This is unsurprising as “an unequal inheritance disrupts... what the disappointed beneficiary thought was a secure attachment relationship with their parent” and “marks out one child as a ‘loser’ in the ‘parental-love competition.’”<sup>580</sup>

#### 4.5.2.2 Atone for prior wrong

A second reason for differentiating between children was highlighted by Laura, who reported that her friend and her friend’s two siblings had been “disinherited” by their father in favour of the children of one of the two siblings. The friend and the other sibling did not have children. Laura reported that, even although the deceased was motivated by “a feeling that he never gave them (the grandchildren) anything, he never gave them any time or wasn’t a proper granddad,” her friend found it to be “a hard pill to swallow,” particularly as the friend was struggling financially while grandchildren were not.<sup>581</sup>

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<sup>579</sup> Vines, P, *Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria* (Australasian Institute of Judicial Administration Incorporated, 2011) at paras 7.1 and 7.2.

<sup>580</sup> Conway, H, “Where there’s a will...: Law and emotion in sibling inheritance disputes” in Conway, H. and Stannard, JS (eds), *The Emotional Dynamics of Law and Legal Discourse* (Hart Publishing, 2016), 41.

<sup>581</sup> While atoning for being an absent grandfather is perhaps a relatively benign example, cases in jurisdictions that allow wills variation often involve claimants who have experienced abuse or neglect. In BC, for example, while the Wills Variation Act was not designed to compensate for abuse or neglect, it appears that the normative belief that the wrongdoer should “make amends” infiltrates judicial thinking. In *Doucette v McInnes* (2009 BCCA 393), Justice Ryan made the following observation: “it is common ground that the Wills Variation act is not intended as a means of awarding compensation for family abuse, but as recognized in *Sawchuk v. MacKenzie Estate*, 2000 BCCA 10, 72 BCLR (3d) 333 at para. 16, where a parent has treated a child unfairly, a judicious parent, after objective reflection, would recognize that a moral obligation to make amends for it through the provisions of his or her will.”

#### 4.5.2.3. The deserving child

Another reason for deviating from the standard practice of treating all children equally is to reward a particularly kind or hardworking child. As adult children are increasingly called upon to look after ageing parents, this may be seen as an entirely reasonable outcome. Certainly, when discussing scenario 2, numerous participants commented that it was reasonable for Ines to receive a larger share of the parents' estate than her sisters. Carol made the following observation:

I would have liked Ines to have got more than just an equal share with Karima because she was the one who was doing the caring on a daily basis and I think it's a shame that the parents didn't show their recognition of that.

However, this view is not universal, and some studies also suggest a considerable degree of discomfort with attaching a monetary value to providing family care.<sup>582</sup>

The question of the relative entitlement of the "hard-working" sibling was one that several participants had contemplated in their own families. Mary, for example, said that she had wanted her sister to have her share of her parents' estate, as the sister had "been the one that's been doing all the looking after, seeing they were OK, checking in on them all the time....". Her sister, however, refused to accept this offer. Similarly, John wanted to see his siblings rewarded commensurately for the assistance they provided to his mother. However, in these instances, the proposed unequal distribution was directed not by the parent but was being negotiated sibling to sibling, as an expression of one sibling's gratitude to another.

In contrast to John and Mary, Catriona cast herself in the role of the hard-working sibling, explaining that her active involvement in the family business gave her a greater claim on her father's estate than her "lazy" sister who "chose not to be involved". However, although she felt resentment at having worked "for the jersey" she understood her father's impulse to share his estate equally. She described the situation as "fair...but not fair" but seemed to draw comfort from her father having recognised that it was a difficult decision:

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<sup>582</sup> See, for example, NatCen study (2010), 66-67.

But equally my dad has said to me, you know, the tendency is to want to do , this and this and give you this but it won't really matter what I do I know you'd do the right thing.

While there was a general acceptance that helping parents was a good and noble thing to do, some were uncertain that this gave children a particular entitlement. This view was particularly strong amongst those who did not live near their parents. Caroline, who moved from Scotland to Canada, defended Karima's entitlement, even although geography meant she did less for her mother than Ines. In Caroline's mind, this did not reduce Karima's entitlement and she saw any redistribution as a matter to be negotiated between the siblings:

Well, it's hard. Everyone makes their own life choices and you kind of have to accept the repercussions of your choices. Karima didn't have to move, but there is nothing wrong with moving, she did have regular contact with her parents at least .... Maybe Ines might get slipped some money by Karima, who knows, but when you have children ... you raise children to be individuals and if one of them moves away to the other side of the world that's ... you can't really penalize them for that. That's their choice.

For her part, Sally expressed disquiet that her siblings may inherit more than her if they help her parents more simply by dint of their geographic proximity:

It's a funny one, because I would have a real issue because my brother and sister both live very close to my mum and dad ... So I think I would have a bit of an issue if it was like oh actually to inherit as much as my siblings I have to live in Northumberland and be there every weekend and do that sort of stuff. And I sort of think, yeah ... if that is part of the deal it has to be said before hand, because otherwise it's like, oh, ok and then I'd have to drastically change my relationship with my parents in order to inherit.

For Caroline and Sally, who are both in their late 30s, caring for elderly parents was still a relatively distant concern and their views may change over their life course. Regardless, with an increasingly globalised workforce and an ageing population, this could prove an increasing source of tension between siblings.

#### 4.5.2.4 Age

A fourth ground for differentiating between children is age. This is particularly important in light of the SLC's proposal to abolish *legitim* and replace it with an

alimentary provision for dependent children.<sup>583</sup> As was discussed above, a number of participants indicated that they did not view the purpose of inheritance as providing for the daily costs of raising children. This is not to say that anyone objected to dependent children being provided with support, but simply that this was not seen as the primary function of inheritance.<sup>584</sup> Instead, the participants appeared to view it as a means of reinforcing an emotional bond between parent and child. For this reason, Caroline wanted to see siblings treated equally, irrespective of age:

I don't think one person should get more. I think it should be equal. She's five now but eventually she will be 21 so I don't think it's fair to reward her for being young. I think probably it's best to be fair. The one thing I would say though is that I would probably keep it in trust for a child until they were old enough to use it in a sensible, meaningful way.

Not all participants shared this view and Simon, the staunchest supporter of unfettered testamentary freedom, appeared to support the SLC's recommendation, suggesting that provision for minor children was the only acceptable ground on which to depart from testamentary freedom.

Nevertheless, although the majority of the participants recognised that people could have sound reasons for differentiating between their children, Finch and Mason's finding of equal treatment was the norm for these participants. Finch and Mason interpret the act of bequeathing to children as "the symbol of a lifetime's commitment as a parent,"<sup>585</sup> an observation that goes some way to explaining why people express hurt over being overlooked by a parent—or treated less favourably—even when they understand there is reason for doing so. Sally takes this a step further, arguing that inheritance is a symbol of love:

because I suppose money does sort of like...it can equate, well when we're talking about this, it equates with love in some ways

Sally's observation resonated with her group and encapsulates a well-established belief that parents are supposed to love their children equally.

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<sup>583</sup> 2009 Report at para 3.65.

<sup>584</sup> The Family Law (Scotland) Act 1985 s 1(4) still contains a provision allowing a person owed an obligation of aliment to claim it from an estate. The provision is, however, virtually obsolete. For a full discussion see Hiram (2007) at para 3.27.

<sup>585</sup> Finch and Mason (2000), 86.

### 4.5.3 Equal treatment at each class of relative

Finch and Mason observed that the principle of equal treatment applies not only to children, but to grandchildren, and this finding was echoed in my study. This norm has already been discussed in relation to Catriona,<sup>586</sup> and another example is found in a story related by Maureen. Maureen and her family looked after her mother-in-law for a number of years and, when she passed, the estate made provision for Maureen's husband, Rob, his brother, his sister and his sister's children. Although Maureen understood her mother-in-law's rationale for providing for Rob's sister's children - the sister was considered to be irresponsible with money - she was hurt by it:

And part of the problem was she'd lived with us for four years and we'd cared for her full-time in every sense of the word...I don't resent that for a minute because I loved her dearly and it was a pleasure to have her in our lives for that length of time ... she has four [grandchildren] and, quite rightly I think, Rob's mum and dad had made provision for her [the sister's] children thinking they wouldn't see any of the money, she would fritter it all away...But she didn't do that for our ... for any of the other grandchildren, so there were some real issues over that, how it felt ... But you have to kind of stop yourself because the intention behind it was really sound. She was very fair. But I've never told my children that because I thought, I don't really want them to think .... So what I did was I just gave them some money to buy themselves something nice to remember their grandma by. Because I think they would feel quite upset about it ...

### 4.5.4 The family safety net

The duties to write a will and to treat children equally were considered by participants as part of a broader duty to be a responsible and just parent. For some participants, a third component of parental obligation was the duty to provide a family safety net, where resources allowed. Other studies have shown that participants were often divided between those who thought that the better parent is the one who teaches her children autonomy and those who argued that part of parenting is providing a safety net.<sup>587</sup>

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<sup>586</sup> See 4.4.1 above.

<sup>587</sup> Finch and Mason (2000), 123-127.

Both arguments were rehearsed in my study, but the latter resonated more strongly with the participants, particularly those who saw themselves as members of the “lucky generation.” Although there was general agreement with Andy’s observation that “you can only make your own way in life,” some participants felt there was a duty to ensure a safety net for family:

I see it also from another view point. We can’t be sure how well off our children/ grandchildren are going to be. This is why I like to pass on money or whatever. But the interesting thing, or corollary to that is that I had nothing as a kid, absolutely nothing. I’m not going to go on about how poor I was, but I’m just saying that I have very very deep memories of just how awful it was, missing out all the time...I don’t resent it but I’m aware that it’s there it probably influences how I think. You don’t know what’s round the corner... Listen, it’s like a wee safeguard.

Lauren was even more forthright on this matter, stating that she did understand parents to have a duty. Her comments were made unbidden, in response to being asked whether she could envisage disinheriting her son:

What could be that bad? Things happen in life. Unless they’ve committed murder or killed your cat or something (laughs)... I think it’s your responsibility as a parent, even if you are not in that child’s life, that when you leave, if you’ve got anything to leave, there should be something goes to them. I think you should. They didn’t ask to come into this world, you chose, even if it was a fluke or an accident, but you still ... it’s your responsibility if there is anything left when you are going. I would say so.

This again suggests that, contrary to the SLC’s opinion that parents are hobbled legally by their inability to sever ties with their children, parents voluntarily assume what has been described as a “no exit” relationship.<sup>588</sup>

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<sup>588</sup> The term “no exit” obligation was coined by Alstott who explains that “the No Exit obligation is deeply embedded in our understanding of parenthood ...[and]... from a broader perspective ... represents an exceptional limitation on parents’ capacity to choose their way of life” (Alstott, A, “What we owe to parents” (April/May 2004) *The Boston Review*, available at <http://bostonreview.net/us/anne-l-alstott-what-we-owe-parents>).

Finally, it is noteworthy that both Lauren and John self-identified as having grown up with very little. While inheritance can be perceived as the purview of the rich, some of the participants who expressed the strongest attachment to notions of parental duty were those who came from families that had little, or had little themselves. Two of the participants, Malcolm and Gillian, tied their parents' desire to leave a bequest to what they termed their "working-class" culture. Gillian explained her father's view as follows:

He worked for BT, he was your average Joe, as you would say, working class Glasgow man, but he was sensible with his money, you know, didn't waste it. I think what upset my mum, not so much my dad as he didn't particularly understand it by this point, but what upset my mum was the fact that, in their generation, as a working class family, it was that you worked hard and, you know, at the end of your days you had something to show for it and you gave it to your family.

Any attempt to assign a particular worldview to a particular group in society is fraught with difficulty; nevertheless, it is worth noting that those who had spoken of financial difficulty in their life, or self-identified as a "working class" family—whatever the term may mean to that individual—also seemed more willing to identify themselves as having a duty to their children. In contrast, opinions were more divided amongst those who appeared to speak from positions of relative affluence: some like Sally, Laura and Catriona were clear both in their expectations of inheriting from their parents and in their desire to provide for their children. However, others like Simon, Gordon and Tom were far less willing to accept notions of parental obligation or the inevitability of children receiving bequests, although all three planned to leave their estates to their children.

#### **4.6 Life-time parental support**

As has been discussed throughout this chapter, "passing on" from parent to child is highly symbolic. It is viewed as an expression of love and a means of reaffirming the parent – child relationship at the end of the parent's life. While some of the participants anticipated bequeathing a relatively significant sum of money to their children, this was viewed not as maintenance but as a protection against the vagaries of life.

However, participants also noted that providing a financial cushion for adult children was not an aspect of parenting that was relevant only at the end of a parent's life, but one that was of varying degrees of importance throughout the parent's life. As has been discussed by media and academic commentators alike, today's parents provide their children with financial support "well into adulthood as fiscal pressures take their toll."<sup>589</sup> Several participants discussed both funding (or receiving parental help for) tertiary education and contributing towards (or receiving a contribution towards) a house deposit. In addition, to large, one-off expenses, participants also spoke of parents and grandparents providing "drip feeds" throughout the child's adult life. Tom explained his approach in the following terms:

Well, I suppose you could call it the old Bank of Mum and Dad. The boiler's burst and the family's skint. They've got no hot water and no heating and two children and the father said I'll go and borrow the money so I said what are you borrowing it at and I'll give you a cheaper rate (laughter). And you help out and there you go and that's fine because you don't want to see them suffer and you see they really don't have the money nor do you want to see them get into the hands of loan sharks and usury and all that sort of stuff.

In a similar vein, John observed:

You can give them something but what you mustn't do is kill ambition. But, knowing that's not the case...sometimes we put money towards holidays or give small sums of money for certain things. Actually our kids are relatively well off, but they have pressure the same as everyone else so sometimes you say give to the grandchildren. If we go and see them we give them some money, we maybe buy some shopping because we're eating their food. They are ordinary things. You don't sit and add it up. Helping them with cars, as Tom said, Laura needed a new car, she'd have to go and maybe borrow money and pay the interest on it. So we said how much do you need and we'll give you that.

Broadly speaking, this form of ongoing parental support intersects with succession law in one of two ways. In jurisdictions with family provision regimes, as explained by Conway, "there is always the possibility ...of financial assistance being transmuted into some sort of dependency or ongoing "maintenance" which strengthens the case for a successful family provision claim by an adult child who is otherwise economically self-sufficient."<sup>590</sup> However, in the Scottish context, such an observation does not apply: eligibility for legal rights or intestate provision is established through proving the existence of a parent-child relationship, and is not a

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<sup>589</sup> Conway (2015), p. 131.

<sup>590</sup> Ibid.

matter for the courts to rule on.

Instead, from a Scottish perspective, ongoing support intersects with inheritance insofar as it bolsters the assertion that parents willingly assume a degree of ongoing obligation. None of the parents in the study begrudged the support they gave to their children, nor suggested that this was a role the state should play instead. Furthermore, some interpreted it as a question of intergenerational solidarity:<sup>591</sup>

We're very aware of being the lucky generation. We bought houses when they were dirt cheap. When we first got married, we've had good careers...compared to kids coming up now... things look a lot tougher and harder (Gordon, group 1).

Maintaining a fixed legal share for children allows the law to accommodate both testamentary freedom and the “no exit” obligation so clearly assumed by many parents.

#### 4.7 Other policy considerations: funding aged care

Family provision claims under English law, where the courts consider (among other factors) the applicant's financial resources, raise important policy questions as to whether “a dead parent's estate should have to provide for a child in receipt of state benefits rather than the public purse.”<sup>592</sup> However, this is of limited relevance within the current Scottish legal framework, where legal rights are available to all children, regardless of wealth. Furthermore, given that the children's legal share is capped at a percentage of the parent's moveable estate, and since the average total estate in Scotland is likely to be less than £100,000,<sup>593</sup> it is unlikely that receipt of legal rights would obviate the need to receive state support.

However, while participants did not meditate on a parent's responsibility, versus that of the state, to provide for “needy” adult children, they did reflect extensively on the duty of the individual versus the duty of the state in the context of aged care.

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<sup>591</sup> The question of intergenerational solidarity has moved higher up the political agenda in recent years, particularly since the 2008 crash. See, for example, House of Commons Work and Pensions Committee, *Intergenerational fairness*, Third Report of Session 2016-2017 (<https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/59/5902.htm>) or The Joseph Rowntree Reform Trust Ltd., *Ipsos Mori Report on Intergenerational Justice*, June 2013.

<sup>592</sup> Conway (2015), p. 131.

<sup>593</sup> Reid and Sweeney (2015) at 412.

Although the high levels of personal wealth among the older generation have led some to speculate that there will be unprecedented levels of wealth transfer,<sup>594</sup> others have suggested that this money will be consumed by care costs as people live longer but with multiple health needs.<sup>595</sup> This has created a new form of competition that pits the claim the state has on an older person's assets to fund social care against the claim the older adult has to maintain her assets for personal use or for a bequest.

Strictly speaking, this is neither an inheritance debate nor an example of competition between the state and the family. Where assets are sold to pay for elder care there is simply nothing to bequeath: any discussion of inheritance is therefore moot. In the same vein, it can be argued that the family is not "losing out" as the anticipated benefactor simply has less money than expected. A family would not be thought to have missed out (or a benefactor thought to have been cheated) if the elderly person dissipated her estate on a series of holidays.<sup>596</sup> However, it appears that self-funding social care is seen by some sectors of society as a direct assault on inheritance and an interference with familial relations.

Although social care was not discussed in the SLC's 2009 Report, it is indisputably a topic that intersects with the inheritance debate. Indeed, the question has been addressed in several major inheritance studies,<sup>597</sup> just as inheritance has arisen—often spontaneously—as a topic in social care studies.<sup>598</sup> Given the burgeoning importance of competition for assets between the state and the family, a decision was made to explore the question further in my research project. Nevertheless, as elder care funding does not relate directly with the succession reform proposals at issue, it was included as a second tier question, to be raised as a topic with participants only where

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<sup>594</sup> See, for example, Kings Court Trust, "Passing on the pounds: The rise of the UK's inheritance economy," February 2017.

<sup>595</sup> See, for example, Simon Kelly and Ann Harding "Don't rely on the old folks' money: inheritance patterns in Australia." (2006) 5 *Elder Law Review*.

<sup>596</sup> See generally discussion in Rowlingson and MckKay (2005), Chapter 4.

<sup>597</sup> See for example Finch and Mason (2000); Olsberg and Winters (2005); and Rowlingson and McKay (2005).

<sup>598</sup> See, for example, Croucher, K and Rhodes, P, *Testing Consumer Views on Paying for Long-term Care* (2006); the Commission on Funding of Care and Support, *Fairer Care Funding* (2011) (henceforth the Dilnot Report), which commissioned deliberative research conducted by Hewitson et al. (2011) for TNS:BMRB. The findings of the research are published in full in the supporting documents to the Dilnot Report, 47, available at <http://webarchive.nationalarchives.gov.uk/20130221130239/https://www.wp.dh.gov.uk/carecommission/files/2011/07/Volume-III-Supporting-documents.pdf>.

time allowed. Furthermore, it was raised primarily with a view to generating supplementary data on parental expectation as opposed to being studied as a topic in its own right. Thus, the exploration focused on the question of if and why the state was perceived as wrongfully usurping the older person's assets and did not consider the comparative merits of different funding models, although participants at times spontaneously offered their views on this question.

The research question set out to pit the state against older people and their children, in their capacity as potential beneficiaries, with a view to determining whether the participants would perceive the state as usurping what rightfully belonged to the aged couple and/or their children. In the scenario,<sup>599</sup> the couple was faced with the prospect of selling the family home—to which the adult children regularly returned as visitors—as their care home costs exceeded their pension income. Although the scenario gave no cause for concern at the pilot stage, it did not yield particularly useful data when presented to Groups 1 and 4. As is so often the case in a discussion on inheritance, the participants prioritised establishing that they were not the sort of people to expect vulnerable elderly people to go without in order to leave an inheritance for adult children.

Nevertheless, in the course of general discussion, the participants engaged with what Croucher and Rhodes term the “natural right” to pass on.<sup>600</sup> Passing on is for many an incontestable right, however, from an alternative view it is, “one of the greatest extensions of property we can conceive.”<sup>601</sup> The right to pass on is well settled, but the right at issue here is a slightly different one: the participants defend not just the right to pass on *available* assets but the “natural” right to defend those assets against “unwarranted” claims from the state. This is an even greater extension of property rights and appears to be rooted in notions of family property and parenting.

In employing the term “natural right,” Croucher and Rhodes were not making a case for the existence of such a right but, rather, were using it as a convenient handle to express the belief that people are entitled to keep some assets for a bequest. In other

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<sup>599</sup> Scenario 6, Appendix 1.

<sup>600</sup> Croucher and Rhodes (2006), 9.

<sup>601</sup> Smith (1982), 38.

words, the term was used to indicate that, for some people, the belief that they were entitled to pass on was so strong that it was experienced as an inviolable right, regardless of competing claims from the state. Croucher and Rhodes did not set out to give meaning to this right, but a broad view of their findings suggests it comprises two elements: the exercise of autonomy and the intention to benefit close family members. It is very telling that, although participants favoured autonomy and testamentary freedom as general concepts, no-one considered the obligation to pay for care to violate an individual's autonomy where the "disappointed beneficiary" was a friend or charity. In other words, the "natural" right is intimately linked to the individual's perceived right to provide for family.

The discussion turned to social care costs in all but one of the discussion groups/interviews<sup>602</sup> and the discussion of "real life" cases allowed the participants to focus on how individual families experienced this contemporary dilemma. In expressing why they felt the state was not entitled to all of the older person's estate, the participants focused on four main themes: autonomy, fairness, family property and parenting, each of which will be examined in turn.

#### 4.7.1 Autonomy

In many cases, participants focused on the older adult's autonomy. In the context of wills, autonomy takes the form of freedom to test; in the context of social care, autonomy relates to maintaining control of assets that represent a lifetime of effort. Finch and Mason explored this question in detail, concluding that the most important point, a "point that subsumed all the rest," was that "elderly people have an inalienable right to use their money as they wish."<sup>603</sup> This may be to pay for care, to do something "wild and wacky" or to leave an inheritance.<sup>604</sup> This view was also expressed in my research, which revealed not only that people prized their autonomy, but that they were not willing to relinquish it. Malcolm, for example, made the following observation:

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<sup>602</sup> Chris (Group 10).

<sup>603</sup> Finch and Mason (2000),115.

<sup>604</sup> *Ibid*, 116.

My mum and dad have already spoken to various lawyers about how they can try to protect their house for myself and my sister and my nieces and nephews ... I don't think the State can have a right to all of it. Part of it, fair enough, through taxation but certainly not take it all away.

Malcolm's view echoes the view expressed in other research studies.<sup>605</sup> Indeed, Croucher and Rhodes found that "the main plank of many people's strategies for funding their own long-term care appeared to be spending their assets to ensure they qualify for state support."<sup>606</sup> It was noted that "whilst it was known that these practices were socially frowned upon, protecting the individual against high costs and instead placing the burden on the State was seen by many to be acceptable."<sup>607</sup>

While children are often portrayed as being in conflict with the state, Malcolm's comments, and those of other participants, suggest that it is the *parents* who are in competition with the state: it is the parents who want to decide when their property passes to their children and it is the parents who identify the children's interest as being interfered with by the state. Croucher and Rhodes expressed a similar view, arguing that some people conceive older people as having a "natural right to pass on assets,"<sup>608</sup> a right that was interfered with when they had to forfeit their homes to pay for care. The distinction between the older person's right and the children's right is an important one and further undermines the pernicious image of the adult child grasping at the parents' assets.<sup>609</sup>

#### 4.7.2 Fairness

The question of having paid tax, or having paid "into the system," was raised by numerous participants who clearly expected to receive a return on their investment in

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<sup>605</sup> See for example Croucher and Rhodes (2006), 37; Finch and Mason (2000), 116; Hewitson et al. (2011), 26.

<sup>606</sup> Croucher and Rhodes (2006), 17.

<sup>607</sup> Hewitson et al. (2011), 26.

<sup>608</sup> Croucher and Rhodes (2006), 9.

<sup>609</sup> In contrast, Miss Scobbie noted that, while clients in their 60s and 70s were often interested in preserving assets for bequests, those who faced moving into a nursing home in the very near future became more interested in using assets for their own comfort. Although I found those in their late 70s and 80s to be the most opposed to spending on a care home, the difference could perhaps be explained by the fact that they were not, unlike Miss Scobbie's clients, contemplating imminently moving into a nursing home and perhaps still believed that avoiding care costs was possible.

their later years. The participants in Group 7, the group that primarily comprised working class men in their 70s, were particularly vocal on this subject and their fury was at times palpable. Alec, who emerged as the spokesperson for the group repeatedly returned to the subject:

Do you see what I'm getting at? Why, *why* should we have paid in everything that we should have paid into legally. National Insurance contributions, tax, everything, looked towards jobs where we get a wee pension and everything else to make our older age better. Why should we then have to pay to go into a care home?

This rejoins the view expressed in other studies, namely that there is a difference between planning for normal living costs and planning for care costs: the former, as foreseeable costs, fall squarely on the shoulders of the individual whereas the latter are viewed simply as bad luck.<sup>610</sup>

While the oldest participants were perhaps the angriest about the prospect of paying for care, they were not alone in feeling that any failure to provide for the “honest taxpayer” was a breach of good faith. Laura, a 40 year-old teacher from East Lothian, expressed a similar view:

It annoys me that I'll have worked all my life and been a public servant all my life and it will annoy me to have been taxed all that time, to have put money into the system for all that time and then at the end of it have everything taken off me and my children to pay for nursing care but someone else in the room next to me getting it for nothing having never worked a day.

In her remarks, Laura moved seamlessly from the breach of the social contract to the question of penalising thrift, a question which, in turn, she intrinsically linked with fairness.

Fairness was the most commonly cited reason for opposing self-funded elder care and was raised in all but three of the groups.<sup>611</sup> Tom and Archie, men of a similar age but of quite different socio-economic status, offered representative views:

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<sup>610</sup> See for example, Ormston et al. (2006), 85.

<sup>611</sup> Groups 4, 6 and 8.

Voice: But they'll sell yir hoose tae keep you in there.

Archie: But see the person that hasnae got a home or nothin'.

Voice: A cooncil hoose.

Voice: They'll no need to pay anythin'.

Archie: They'll no need to pay anythin'. I think that's gallin'.

Tom: It's a very contentious issue, because these people have saved up, got their house and all the rest of it. And they are in a care home. And in the next room to them, or bed, is somebody who has not made that provision, who doesn't have any assets and who is getting the same amount of care and yet, the person who has made the provision is being forced to sell the asset so the kids don't get anything, depending on how long the person lives.

Tom's response was typical in that he began by commenting on the penalisation of thrift but his real point was one of fairness.

### 4.7.3 Family property

One of the main reasons that self-funded elder care is perceived to be “unfair” is that it is seen to prevent people from leaving an inheritance for their family, and in particular their children. In their remarks on fairness, participants such as Laura and Tom (quoted above) both identified the children as the losers, and they were not the only participants to do so. Indeed, the discussion on this point proved very valuable as, while voicing their views on fairness, the participants indirectly revealed views on family property which, on the whole, did not chime with the dominant narrative that holds property to be owned and earned by the individual.<sup>612</sup>

If asked outright whether children were entitled to inherit their parents' property, the majority would likely have said no. However, when not directly considering the question of children's entitlement, a different picture emerged. Tom lamented that a sale of assets would mean that “the kids don't get anything,” while Laura worried that everything would be taken from “me and my children.” Tom clearly felt that this was unjust and, while this was likely in part attributable to his belief that such an outcome would not be in line with the typical parent's wishes, this may not be the only explanation.

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<sup>612</sup> See, for example, 2009 Report at para 3.30.

As mentioned above, not a single participant raised concern about self-funded care preventing people from leaving bequests to the friends or charities of their choice, gestures that do not appear to be seen as the core function of inheritance. It may be, therefore, that the sense of injustice only fully emerges when parents cannot leave bequests to children. Certainly, while participants harshly judged the fictitious individuals in the scenarios if they suspected them of “expecting” an inheritance, they passed no judgment on individual accounts of people *wanting* to pass on to their children. This they accepted as both entirely understandable and inevitable. Furthermore, they expressed sympathy for children who “missed out” when care had to be self-funded, again suggesting that people do believe that children have an “interest” in parental (or familial) property and/or that parents have a natural right to pass on.

Given that all of the participants in the research project appeared to enjoy good relationships with their children, their desire to bequeath assets to them could be construed simply as an exercise of autonomy, unrelated to notions of family property. More research would be needed to understand better whether the “natural right” to pass on – a right which involves preserving assets for inheritance - is also understood to exist for those who do not have descendants.

Carol, the one participant who touched on this question, did not appear to consider all benefactors to have such a right. Although Carol stood to be the main beneficiary in her aunt’s will, she was unconvinced that the aunt should be allowed to pass her whole estate on:

My aunt is an unmarried lady. No children ... I take a lot to do with her. She was a teacher, but she was very frugal, she’s invested it wisely, she hasn’t wasted it. So, money makes money and now that she’s an older lady she’s comfortable, not wealthy. And that’s what she says. I want it to go to you, I don’t want it to go to the government, I’ve worked hard all my life, I’ve paid my taxes. And I can see where she’s coming from but I also know as we all know that we are all living far too long and the country cannot support us all so we need to think about how that can be done.

In the course of the discussion, Carol did not express her view as to whether similar limitations should be placed on passing on between parent and child, but she certainly

did not question having inherited her family home after her father died. Her father, it can be assumed, had a “natural right” to pass on to his children and she had an “interest” in the family property. In contrast, she considered both her aunt’s right to pass on, and her interest in the family property to be less certain.<sup>613</sup>

It is also noteworthy that those participants who did try to articulate why parents should be able to pass on to their children did not speak of only love or choice, but of the “done thing.” In doing so, and without negating the importance of love or of choice, they also recognised a wider, normative societal value. Even more importantly, despite inheritance being commonly portrayed as the preserve of the wealthy, where passing on was identified as a societal value, it was also identified as a working class value. Two participants specifically identified it as a working class value,<sup>614</sup> while a third identified it as the traditional or “old-fashioned” way of ensuring a better life for subsequent generations.<sup>615</sup>

Of these three participants, one had first-hand experience of the devastating cost of elder care since both her parents were in residential homes at the time of the interview: one suffering from severe Alzheimer’s and one with advanced motor neuron disease. Gillian was clear that she would “gladly give every penny” to have her parents well cared for, but she spoke frequently of how upset her mum was to see her assets disappear in care costs when she had “worked hard” to be able to leave something to her family.

A similar view was expressed by Malcolm when he spoke of his father’s desire to make provision for his grandchildren:

I would take issue with Simon’s point from earlier, I understand what he is saying, nobody’s got a right to inherit anything and I appreciate there’s totally different ends of the scale, from leaving a multi-million pound estate to the average person, like my father, who’s working class, born in a tenement, brought up, he’s got his own house, it’s worth a quarter of a million pounds...he doesn’t want to see all that money disappear to the state, he wants

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<sup>613</sup> Similarly, continuing the conversation after the interview had been concluded, Ron expressed doubt that his partner should have been allowed to inherit (through a will) £50,000 from a distant aunt.

<sup>614</sup> Aileen and Malcolm.

<sup>615</sup> Moira.

to use that for the good of his grandchildren—not necessarily me and my sister—when they grow up and go to uni.

It is noteworthy that these views did not meet with dissent from other group members. While two participants, rightly, raised concerns about the effect of inherited wealth on social inequality, this was not considered to be an issue that applied to the “ordinary” people they doubtlessly saw themselves to be.<sup>616</sup>

While not self-identifying as working class, the participants from the most ostensibly working class group also appeared to hold the view that older people were entitled to protect assets to leave to their children:

Archie: See the money we’ve got noo, what we’ve got in the bank and to leave wir kids, we’ve worked for it.

Voice: you’re right by the way

Archie: And we’ve knocked wir pan in to do it. And we still get penalised ... it’s no’ all about this... (referring to a digression in the debate into the terrain of the Scottish referendum)

Tom: This meeting’s about these things, inheritance, nothin’ to do with Trident

Archie: That’s oor inheritance. We’ve worked for oor inheritance and to gi’e it away, that’s ma point.

None of these participants questioned that the money belonged to the older adult; but, equally, there was no question that the children and the grandchildren were perceived as the rightful end recipients.

In light of this discussion, it may be helpful to revise our understanding of family property. A traditional understanding of family property privileges a linear transmission of intact property down through the generations. Based on this definition, Finch and Mason argued that their data revealed “weak or non-existent versions of the idea of family property”<sup>617</sup> and the same could be said of my findings. As was the case with Finch and Mason’s participants, the research project participants were not concerned with transmitting the property itself, but with its monetary value. Similarly, they were not concerned with generational transfer in perpetuity but instead

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<sup>616</sup> Simon, for example, railed against inequality but reported that he had inherited his father’s estate “which included a house in Cornwall”.

<sup>617</sup> Finch and Mason (2000), 128.

had only a “limited” downward gaze.<sup>618</sup> Yet this is only half the story. While there is no sense of family property in a traditional, aristocratic sense, there is every sense that the property, when no longer needed by its owner, should rightfully pass to the children.

This sentiment gives expression to a very different type of family property, which might better be explained by a concentric circle model than a linear one. The assets belonging to the individual (and/or parental unit) sit in the inner circle, tightly ring-fenced; the children (and sometimes the grandchildren) sit in the second circle, their own assets equally tightly ring-fenced. However, when the parent or parents no longer have any use for the assets they are subsumed into the children’s (or the grandchildren’s) circle.

The idea of a concentric circle model is borrowed from Finch and Mason’s understanding of English kinship. They argue that the majority of contemporary empirical studies demonstrate that “most people operate with a concentric circles model of their own kin, with the relationships being most significant between those in the inner circle.”<sup>619</sup> However, they also argue that their research revealed the most important facet of English kinship to be its flexibility, meaning that it is the quality of the relationship, not its status, that qualifies an individual’s inclusion in the inner circle. Nevertheless, they also found that “the only feature that is highly predictable is that the inner circle of intimate kin almost always includes ‘biological’ parents and children, however warm or difficult the actual relationship between the parties.”<sup>620</sup>

The inheritance concentric circle model and the kinship concentric circle model are therefore very similar: just as any friend or relative can appear in the inner kinship circle, any friend or relative might inherit; however, just as children almost invariably appear in the inner circle of the kinship model, they (along with grandchildren) are also the only family members to benefit from the assumption that they are *rightful* beneficiaries, even when the relationship is not perfect.<sup>621</sup>

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<sup>618</sup> *Ibid.*, 133.

<sup>619</sup> *Ibid.*, 11.

<sup>620</sup> *Ibid.*

<sup>621</sup> See Chapter 4, 4.2.1 and 4.2.3.

A model of concentric circles is thus a more accurate way of reflecting the way in which the participants appeared to understand family property in an inheritance context. Although the participants in the research project often mentioned the desire to provide for grandchildren, the “downward gaze” went no further: there was no mention of preserving the family name or position forward through time. Instead, family property is an affair of children and grandchildren, people with whom the older person can be expected to have a close relationship.

#### 4.7.4 Parenting and the provision of a safety net

My research project revealed the existence of the same two opposing parenting philosophies that were identified in other studies including the Finch and Mason, AHURI and Rowntree studies.<sup>622</sup> In general, the view that passing on was part of good parenting was the more prevalent view, to the extent that it was seen more as an inevitability than an active parenting strategy. A minority of participants did nonetheless recognise the “dangers” of “spoiling” children, although none of the participants appeared to consider this to be a risk in their own families. Certainly, unlike some of the participants in the studies discussed above, none of the participants planned to leave their children out for this reason.<sup>623</sup> Indeed, those who did express reservations about children inheriting too much were more worried about social inequality than they were about the prospect of raising feckless children.

It is also noteworthy that those who expressed concern about the ills of passing on enjoyed, from the limited biographical data provided, a higher socio-economic status than those who embraced it. Certainly, when Simon and Gordon decried the dangers of inherited wealth, the two participants, Malcolm and John, who directly challenged them specifically identified as being from working class backgrounds. As was discussed earlier,<sup>624</sup> having grown up in poverty, John had no illusion that financial hardship allowed people to test their mettle and was determined to provide his children and grandchildren with “a wee safeguard.” In constructing inheritance as a social safety net, John echoed the views of the Institutional writers who identified a

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<sup>622</sup> See Finch and Mason (2000), p. 124-125; Olsberg and Winters (2005), 61-62, and Rowlingson and McKay (2005), p.14.

<sup>623</sup> See for example Olsberg and Winters (2005), 70.

<sup>624</sup> Chapter 4, 4.5.4.

duty to provide at least a minimal level of support for family members.<sup>625</sup> The question of the family as the social safety net is of course one of growing relevance in the current economic climate.<sup>626</sup>

## Conclusion

This chapter has introduced some of the key thematic codes that will be explored throughout this thesis. Notions of expectation, autonomy, parental duty and family property have all been shown to shape how people decide who holds a legitimate claim to a deceased's estate. More importantly, it has shown that people's interpretations of these concepts are not fixed, but shift according to the facts at issue. This is not to suggest that the participants lacked cogent thoughts but that no formula exists to create the "right" outcome for all people at all times. However, while people's views are not immutable, it would be equally untrue to suggest that they are in a constant state of flux. Where the parent-child relationship is not irreparably damaged, it is generally felt that providing a minimum share for children does not unduly undermine individual freedom.

This does not mean that all participants supported this view: Simon and Kathleen clearly held testamentary freedom to be the most important principle in the context of succession law. Nevertheless, a significant number of participants either actively supported providing children with a guaranteed minimum level of provision, or at least accepted it as a compromise solution. Certainly, nothing suggested that participants – even those who generally supported testamentary freedom – were upset by the existence of legal rights, or angered by their inability to disinherit their children. Indeed, the strength of parental desire to provide an inheritance was one of the most important findings of the study and arose from a sense of love and the self-imposed obligation that flows from that love.

Finally, this chapter also illustrated the way in which the current economic context is pushing the issue of parental obligation to the fore. The contention that "generation-

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<sup>625</sup> Stair, *Institutions*, 1.5.7.

<sup>626</sup> See generally Picketty, T, *Capital in the Twenty-First Century*, (Harvard University Press, 2014)

on-generation” economic progress has stalled<sup>627</sup> resonated widely with participants, many of whom felt their children faced a bleaker economic future than did previous generations. As a result, many parents continued to provide children with some form of financial support well into adulthood.<sup>628</sup> However, while parents were clear in their intention to continue to provide some form of support through a bequest, they were also aware that their assets could be “lost” to elder care costs. The strong desire to provide children with on-going financial support from beyond the grave, together with the perceived unfairness of the state’s claim on the assets that would allow such a bequest to be made, mean that inheritance is likely to remain on the political agenda for many years to come.

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<sup>627</sup> Adam Corlett, As times goes by: shifting incomes and inequality between and within generations, Resolution Foundation, Intergenerational Commission Report February 2017, p. 3.

<sup>628</sup> This phenomena has been widely reported in other studies and in media reports. For example, according to the Centre for Economics and Business Research, parental assistance was present in 26% of all property transactions that took place in the UK market in 2017 (Centre for Economics and Business Research, “The Bank of Mum and Dad in 2017 will help buy homes worth over £75BN and fund more than one in four property transactions in the UK”), 2 May 2017.

## Chapter 5: First and second families

### 5.1 Introduction

Chapter 4 examined the basis of children’s perceived entitlement to a share of their parents’ estates, highlighting conceptions of family property and obligation, as well as competing notions of autonomy and individual choice. The discussion focused almost exclusively on the normative expectations that operated in “intact” families, or in families where the parents were widowed or divorced, but had not formed subsequent relationships. In contrast, this chapter will focus on families where one (or both) of the parents has formed a second, or subsequent, relationship. This family formation will be referred to as one which creates a “first family/second family” dynamic, with the first family represented by the issue of the earlier union and the second family represented by the second (or subsequent)<sup>629</sup> spouse.<sup>630</sup> The families referred to by such a designation are those where the new spouses met when the children of the first union were already adults and have, therefore, never lived with the new spouses in a family unit. This family formation is distinguished – for the purposes of clarity – from stepfamilies,<sup>631</sup> which, as will be discussed in Chapters 6 and 7, are often understood to comprise children from an earlier union living in a family setting with their parent and the second spouse.<sup>632</sup>

As was established previously,<sup>633</sup> the SLC sought to reform the law of succession at least in part because of “the significant changes in Scottish society and the way in which people live.”<sup>634</sup> The SLC considers the reported rise in stepfamilies (and presumably first family/second family dynamics)<sup>635</sup> to constitute part of this change,

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<sup>629</sup> Any use of the term “second spouse” can henceforth be read as meaning second or subsequent spouse.

<sup>630</sup> This definition is based on that provided by Norrie (2008) at 80.

<sup>631</sup> It is fully appreciated that such a distinction is artificial and that some individuals may be part of both a stepfamily and a first family/second family dynamic, or indeed some hybrid of both. Nevertheless, some form of taxonomy is necessary to facilitate discussion and comprehension.

<sup>632</sup> Note that this common understanding of stepfamilies does not necessarily correspond to the legal reality. This will be explored further in Chapter 6.

<sup>633</sup> Intro, p22.

<sup>634</sup> 2009 Report at para 1.3.

<sup>635</sup> As will be discussed in Chapter 6, there is a dearth of information as to the number of stepfamilies in Scotland. Statistics on the prevalence of the first family/second family dynamic are even less readily available. The Scottish 2011 census, for example, did not include questions about whether spouses

and so it might be expected that particular consideration would be paid to these families in the Report.<sup>636</sup> However, while the SLC recognises that “the balance of interests” in first family/second family situations may need to be “struck differently from the balance in those intra-familial competitions which will presumably be the norm”<sup>637</sup> the quest to find that balance is dismissed before it even begins.

The principal reason that the balance may need to be struck differently is that conduit theory<sup>638</sup> is thought unlikely to operate in a first family/second family context, as the second spouse is unlikely to pass on wealth to the pre-deceased spouse’s children upon his death. It is also recognised that many people consider this to be in some sense unfair, perceiving the children to be “disinherited.”<sup>639</sup> This chapter is dedicated both to analysing why such an outcome is considered to be unfair and to examining what aggravates or reduces the perceived injustice. Brief consideration is also given to alternative models that could mitigate this sense of unfairness.

## 5.2 The research scenarios

The tension between first families and second families was explored in my research study both by seeking out participants with personal experience of being part of such family groupings,<sup>640</sup> and by presenting participants with research scenarios involving first and second families. Given the importance of the theme, three scenarios were designed to elicit debate on the topic;<sup>641</sup> however, the pilot study suggested that participants would fully engage with the topic through the first scenario alone and, as

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have children from previous relationships who are not living with them. The lack of available information is not unique to Scotland or the UK. In Canada, for example, Wu et al. commented that while “a growing proportion of individuals are re-entering the dating and marriage market in later life because of population aging and the increase in union dissolution ...[...]. little is known about marital and non-marital union formation in later life.” (Wu, Z, Shimmele, C and Ouellet, N, “Repartnering after widowhood” (2015) 70 *Journals of Gerontology, Series B: Psychological Sciences and Social Sciences* 496 at 496).

<sup>636</sup> Note that the SLC does not always appear to distinguish between stepfamilies and first family/second family dynamics. In paragraph 2.29 of the 2009 Report, for example, it employs reconstituted families as a synonym for stepfamilies, before illustrating a point about reconstituted/stepfamilies with reference to the dynamic between first families and second families.

<sup>637</sup> Norrie (2008) at 80, cited in 2009 Report at para 2.29.

<sup>638</sup> See Chapter 3, 3.1.

<sup>639</sup> See, for example, Norrie (2008) at 79 and NatCen study (2010), Ch 5.

<sup>640</sup> Ron and Chris.

<sup>641</sup> Scenarios 1, 3 and 4 (see Appendix 1).

such, it became the “core scenario,” with the other two presented only where time permitted.<sup>642</sup>

Part A of scenario 1 addressed testate succession, while Part B addressed intestate succession. The decision was made to link the two scenarios in order to illustrate that the children of the first relationship “lost out” to both the second spouse and then subsequently to the second spouse’s children. However, the scenario was also intended to provoke discussion of testate and intestate succession as two distinct issues. In spite of this objective – and perhaps understandably – the participants did not proceed with a dispassionate linear analysis of parts A and B. Instead, they generally grouped the two parts together and focused on the “unfairness” of the outcome, relatively disinterested in whether that outcome was caused by the statutory regime or by what they felt to be questionable decision-making on the part of the first deceased (Kate).

The participants’ responses to the scenario showed clearly that they considered the “disinheritance” of Mark and Lucy, the children from the first marriage, at the expense of the second spouse to be unacceptable; and, for some, the sense of injustice was heightened when the estate passed to the second spouse’s children in Part B. In all, 19 participants expressed an openly negative reaction to the outcome, either by voicing their opposition to what they perceived as a “wrong” or “unfair” outcome,<sup>643</sup> or by stating that it was not something they themselves would do.<sup>644</sup> While this figure holds no statistically representative value, it mirrors findings recorded in other studies. In the NatCen study, for example, only 15% of respondents favoured the spouse receiving everything where the deceased had adult children from a previous relationship.<sup>645</sup>

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<sup>642</sup> Focussing on one scenario also helped avoid participant fatigue. Appendix 1 contains a table indicating which scenarios were presented to which groups.

<sup>643</sup> Mary, Caroline, John, Tom, Olga, Carol, Joan, Mona, Gillian, Moira, Maureen, Mark, Gladys, Lucy, Sally, Catriona, Laura, Lauren, Ron.

<sup>644</sup> Note that Gillian adhered fairly strongly to the principle of testamentary freedom and remarked simply that she would not have made the same decision. At the other end of the scale, John explicitly stated that no-one should be allowed to disinherit their children.

<sup>645</sup> NatCen study (2010), 49.

### 5.3 Factors underpinning the children's entitlement

Before considering why the children were considered to be entitled to a share of their deceased parent's estate in a first family/second family context, it bears repeating that those who objected to the outcome of scenario 1 were in no way suggesting that the second spouse had no claim on the deceased's assets, or even that her claim was secondary to the children's claim. The spouse was almost always recognised as a key member of the family, with several participants pointing out that Kate and Dave had chosen to spend their lives together.<sup>646</sup> Instead, the participants' concern was primarily to ensure that the deceased's children also received some form of recognition at the end of their parent's life.

The participants' discomfort with the outcome of scenario 1 tended to be expressed as a variant of certain key themes, many of which were discussed in Chapter 4: the parental obligation to write a will (and to provide for children); the existence of family property; and, the need to reaffirm the importance of the parent/child relationship at the end of the parent's life. However, in the context of the first family/second family, these points take on added significance, as there is no second opportunity for these obligations to be met. When an estate passes from one parent to another in an intact family, it does not matter whether the pre-deceased parent has made provision for his children as there is no expectation on the part of the children to inherit at that stage. However, in passing on the estate, the first parent also "passes on" to the surviving parent the duty to provide for the children; and, where those obligations are not met tensions can arise.

In setting out reasons that could justify breaching the norms discussed above in the context of first families and second families, participants marshalled the same arguments that were explored in Chapter 4 in relation to intra-familial conflict: the importance of testamentary freedom; the relative needs of the actual beneficiary and the disappointed beneficiary; and, the quality of the relationship between the deceased and his children. However, in Chapter 4, testamentary freedom was primarily discussed in the context of a parent's duty to treat his children equally and, in such

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<sup>646</sup> Mary for example observed "she chose to marry him...that was her husband and she probably expected to live a long time with him, you know."

instances, participants were willing to defer to the parent's judgement, assuming it to be benevolent. In contrast, when testamentary freedom was considered in the context of first families and second families it gave rise not only to the question of what duty the testator owed his children, but also what duty he owed his pre-deceased spouse.<sup>647</sup> This important point will be explored in section 5.5.2 to 5.5.6 below.

### 5.3.1 The duty to write a will and provide for children

The general duty a parent has to provide for his children by writing a will<sup>648</sup> was considered particularly important in first family/second family scenarios. While participants were not asked to comment on scenarios involving intact families, Catriona, Lucy and Laura – all of whom were in intact families themselves – spontaneously remarked that they were relatively unperturbed by not having a will as they were happy for their respective estates to pass to their spouses or children on intestacy.<sup>649</sup> In contrast, when considering scenarios that involved a first family/second family dynamic, a number of participants remarked that the deceased had been remiss in not writing a will.<sup>650</sup>

Indeed, when confronted with cases of intestacy, the participants focused not on the shortcomings of the statutory regime, but on the culpability of the parent who had failed to write a will. In relation to scenario 3, for example, Caroline commented:

I suppose it's more the fact that he died without consciously saying, I have two children, a son and a daughter and I want them to have this. It's more the fact that he just deliberately ignored them. That's kind of more the principle, more than the monetary value.

The participants' tendency to focus on the failings of the deceased meant that they did not use this scenario to consider if and how the statutory framework could be amended to better meet expectations. However, while more

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<sup>647</sup> Reference is made to a pre-deceased spouse as opposed to a previous spouse, as it is more complicated to assert the spouse owes a duty to his ex-spouse when assets are supposedly fairly distributed at the point of divorce. This may be open to dispute, but is beyond the scope of this thesis.

<sup>648</sup> The general duty is discussed in Ch 4, 4.5.1.

<sup>649</sup> As will be discussed below, the participants tended to frame their narrative in terms of both spouses dying simultaneously with all assets passing to the children. Overall, they had given little thought to one spouse dying before the other, and even less to the surviving spouse remarrying. As such, they viewed the rules of intestacy as operating to pass their estate to their children, rather than their spouse.

<sup>650</sup> For further discussion, see also Ch 4, 4.5.1.

information on this may have been valuable, the objective of the research was to evaluate attitudes, and not to garner concrete suggestions for reform, and any “loss” of content was therefore relatively insignificant.

### 5.3.2 Family property (items of sentimental value)

The concept of family property emerged as a second – extremely important – reason underpinning the children’s entitlement to a share of their deceased parent’s estate. Two types of family property were identified in the data: sentimentally important items and financially valuable assets. The narrative surrounding both types shifted slightly in the case of a first family/second family dynamic, moving from one that focused simply on the children as the “natural” end recipients of their parents’ assets,<sup>651</sup> to one that focused primarily on the contribution the first spouse had made to the family wealth. When items of sentimental value were involved, the children’s entitlement was in some ways even clearer: it was not just that the first spouse had contributed to accumulating the assets, but that they belonged to him and were in no way connected to the second spouse.<sup>652</sup>

While scenario 1 focused on a financially valuable estate, several participants spontaneously offered views on articles of sentimental value in the course of the discussions: Reg referenced his father’s war memorabilia; Sally reported that certain items that her husband had received from his father would pass down his side of the family; and several others mentioned jewellery or other objects.<sup>653</sup> In broad terms, an item of sentimental value can be understood as an object that “carries the memory of the person who owned it;”<sup>654</sup> such items do not necessarily have monetary value but, instead, are given both their “meaning” and their “value” by the memories they invoke.<sup>655</sup>

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<sup>651</sup> See Ch 4, p107.

<sup>652</sup> As discussed by Conway, sentimental items can also be a source of tension between siblings (Conway (2016), p.42-44)

<sup>653</sup> Caroline and Mark also spoke of the “history” and “childhood” tied up in the family home, but given the significant financial value of a house, homes cannot purely be viewed as sentimental items.

<sup>654</sup> Finch and Mason (2000), 142. Finch and Mason use this definition to apply to keepsakes, which they distinguish from heirlooms, which they in turn define as items that do not have “any personal symbolic significance” (*ibid*, 149). However, my study did not reveal any significant data on such inheritances and, as such, no difference is made here between items of sentimental value, keepsakes or heirlooms.

<sup>655</sup> Finch and Mason (2000), 149.

It goes without saying that conflict as to who is entitled to a particular sentimental item is not limited to cases where a first family competes with a second family. Most obviously, conflict can arise at an intra-familial level between siblings.<sup>656</sup> However, in my research project, the stories the participants told all involved instances where the “competitor” was an “outsider” in the form of a second-spouse, a stranger, or an in-law. Yet, while different versions of the “outsider” peopled the participants’ narratives, they all created the same effect: by receiving the object at the expense of the disappointed beneficiary, they disrupted the ability of the object to function as a repository of memory for the “rightful” recipient.

Maureen had a complex family history and shared several inheritance stories, including some on the subject of assets that held sentimental value. Her father had left the vast majority of his estate to his second wife although his sister had, through inheritance or otherwise, acquired his violin.<sup>657</sup> Maureen was involved in caring for her father’s sister – her aunt Jess – during her decline but her aunt bequeathed her entire estate to “these people they’d went on holiday to visit.” Maureen was unperturbed by the financial “loss” but was determined to get the violin back:

However, there were a couple of things that would have been my dad’s ...[including]... a violin and I kind of wanted them ... I wanted them in principle ... so I asked for them. The woman by this point had taken five van loads of stuff out of the house. Very unusual. The solicitor was quite uncomfortable with that I think, primarily because he thought I’d been very responsible around property and all that ... so he then put it to the people that benefited and they said yes, I’d get it back if I bought it. I think that’s really mercenary.

Maureen eventually got the violin back although she described the time as “a horrible experience ... I hated every minute of it” and was shocked by what she perceived as the callousness of the beneficiaries, particularly, she felt, with regard to the violin that could not hold the same value for someone who was a stranger to her father.

In contrast, Maureen spoke of her discomfort when her aunt Jess, who suffered from dementia, had tried to give Maureen some of her jewellery before her death. Maureen

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<sup>656</sup> Conway (2016), 35.

<sup>657</sup> Maureen spoke at length of her inheritance experiences, but certain details nonetheless remained slightly unclear and it was not always appropriate to seek clarification.

did not want the jewellery, feeling that she was not entitled to it as she did not have the requisite bond with the aunt: were she to accept it she would be the outsider breaking the connection between the item and a more “natural” recipient:

You know, my aunt was always trying to give us money or things you know, I don't need these earrings anymore you have them. I was always incredibly wary because I would say no don't give them to me because I felt compromised by that because we weren't close.

Maureen's attitude demonstrated that, contrary to the popular narrative, feeling entitled to certain assets is not necessarily indicative of greed or cupidity: clear as she was that she was entitled to her father's violin, Maureen was equally clear that she had no claim on her aunt's jewellery.

Another category of recipients whose entitlement to items of sentimental value was ambiguous was in-laws; and specifically daughters-in-law who inherited ahead of daughters.<sup>658</sup> Lucy, while accepting her mother's decision to pass on some of her jewellery to her daughters-in-law, felt slightly jarred by it; Gladys acknowledged that her daughter did not fully embrace her decision to leave jewellery to her daughter-in-law; and Laura remarked that her sister-in-law had “felt very weird” about being invited to choose something from her husband's grandmother's jewellery, although she eventually took something as “a token gesture.” Although in-laws were family members, the participants did not readily accept that a daughter-in-law was equivalent to a daughter, who enjoyed a special status in the inheritance narrative. However, while the daughters saw themselves as more entitled than the daughters-in-law, they often ultimately accepted the daughters-in-law being included as they were standing in the shoes of the mother's sons, as opposed to inheriting in their own right.

Clearly, passing on items of sentimental value is an important way of reaffirming a relationship at the end of the parent's life. Whether by design or by unintended consequence, this is something that has long been addressed by the Scots law of

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<sup>658</sup> While some of the discussion around sentimental items was gender neutral, a significant part of it related to jewellery being transmitted from mother to daughter, perhaps because it was primarily raised by women. With the exception of Reg, who discussed receiving his father's war memorabilia, there was no “father-son” equivalent to this mother-daughter norm. Nevertheless, many mothers addressed this by offering the “son's” share to their daughter-in-law.

intestate succession. While section 8(3) of the 1964 Act provides the surviving spouse with a right to receive furniture and plenishings up to a certain value, section 8(6)(b) excludes heirlooms from the definition of furniture and plenishings contained in section 8(6)(c): “any article which has associations with the intestate’s family of such nature and extent that it ought to pass to some member of that family other than the surviving spouse of the intestate”. Reid observed that Scotland is “possibly unique in retaining a legislative provision designed to ensure ‘heirlooms’... pass to a blood relative and not to the surviving spouse,”<sup>659</sup> perhaps one of the reasons why the SLC decided to remove any trace of the provision from the proposed new legislation. In addition, eliminating the provision also accords with the shift towards both simplification and further spousal preference.

Nevertheless, the data suggested that people continue to consider the children to have a strong claim on certain sentimental items. Indeed, while heirlooms could of course be claimed by family members other than descendants, the participants, with the exception of Sally, made no reference to the maintenance of the blood-line: the goal was to preserve objects of sentimental value for the deceased’s children. It is thus unfortunate that, in addition to reducing the children’s entitlement on intestacy, the reforms also remove a provision that serves both an important expressive function and a form of protection for descendants in first family/second family scenarios.

### 5.3.3 Family property (entitlement to a share of the parents’ wealth)

The second form of family property participants identified was the material value of the parents’ assets. Under the current rules of intestacy (and the proposed reforms), an individual’s entire estate will pass to his children in the absence of a surviving spouse.<sup>660</sup> In families where the surviving parent has not remarried, this allows for the operation of conduit theory: the estate passes from “dad” to “mum” (or the other dad) and then on to their children. In such situations, the children can only be “disinherited” if the surviving parent actively chooses to do so. As such, where a child is “undeservingly” disinherited in favour of another beneficiary, only the child is seen as having been wronged: for example, the only “victim” in scenario 2 was Aisha, who had been overlooked by her parents in what some participants felt was an unduly

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<sup>659</sup> Reid (2015), 493.

<sup>660</sup> 1964 Act s 2(1)(a).

harsh punishment. As the parents had acted in concert, neither was presumed to be unhappy with the outcome.

However, in a first family/second family scenario, where the child “missed out” on an inheritance, the pre-deceased spouse was also viewed as having been wronged. The rationale underpinning this view was that half of the recently deceased spouse’s assets notionally belonged to his spouse, whose wishes should have been considered in disposing of them.<sup>661</sup> It is unlikely, according to this line of thinking, that the pre-deceased spouse would have favoured the surviving spouse’s new spouse or children, over his own children. Gladys’ comments on scenario 1 were fairly typical:

See I would think that that £60,000 in savings were savings that she’s made with her first husband and the children shouldn’t miss out on that, because that is the hard work of their parents together.

In Gladys’ mind, although legally Kate’s, the estate did not morally belong exclusively to her and, consequently, she should not have ignored what her pre-deceased husband would have wanted.

Ron, himself a widower, was the most forceful in making this point. Ron re-partnered in his early 60s, a few years after the death of his first wife, and was unequivocal that his estate must pass to his children, not his new partner:

To bring it back to this. I tend to see half of what I have as being Susan’s [his pre-deceased first wife]. So that half if you like automatically goes to the children, rightfully. If you have your scenario, like there and it goes sideways and then to somebody else. I don’t think that’s right. That to me would be wrong.

Ron’s comment was made in response to scenario 4, and he was particularly disturbed by the idea of his first wife’s notional half passing to his new partner’s children. This is not to say that Ron was indifferent to his obligations to his new partner, whom he stressed would be provided for both by his pension plan and a liferent on his estate.

### 5.3.4 Later-life marriages

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<sup>661</sup> The same finding was made in NatCen study (2010): see discussion in Douglas et al. (2011) at 264.

Closer examination reveals that Ron's concern was not only for his first wife's share, but also for his *own* half share. In a separate discussion,<sup>662</sup> Ron explained that, in his first marriage, he viewed himself and his wife as the joint owners of their assets, as whatever they amassed was the product of their combined work, sacrifice and good fortune. In contrast, he appeared to view himself and his new partner as the individual owners of separate assets, which they may or may not choose to pool. As Finch and Mason pointed out, this separation is not necessarily reflected "on a day-to-day basis" but exists instead as a conceptual divide<sup>663</sup> that becomes evident upon the dissolution of the relationship. While Ron did not comment on the daily financial management of his second relationship, the divide was clear in the context of succession planning: beyond the liferent, he chose not to share even his "share" of the assets from his first relationship with his new partner, favouring instead his children. This decision may reflect the fact that the partners met later in life and, were Ron's notional half of his estate to pass to his new partner rather than his children, it may not be long before she too died and that property passed to her children.

This point was also made by Group 6 participants as they reflected on Kate's decision in scenario 1. In the following excerpt, Catriona and Sally discuss how they perceive a second marriage to be different, both because the spouses do not have a history of common endeavour and because they are less likely to have a long future of interdependence:

Catriona: The decisions I would make now with my first husband and, at age 40, would be different from the ones I would make at age 62, in my second marriage, probably. I don't know, I'm not in that situation, but I think I would be thinking, well actually I'm not going to be here for a very long time, is it right that someone who I've known for three years gets all the money I've earned over my entire life so I probably would, at that stage, be more likely to have included children.

Sally: And actually, you probably feel more separate by that stage.

Catriona: Yes.

Sally: You would probably feel not in that first flush of sort of wanting to join everything quite that way.

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<sup>662</sup> Ron continued to discuss the issues once the "official" interview had concluded and recording stopped.

<sup>663</sup> Finch and Mason (2000), 37.

While it certainly cannot be assumed first family/second family scenarios only ever involve spouses who met in their 60s, the rise in the number of divorces amongst the over 60s<sup>664</sup> and the average age of widowhood mean that such situations are not uncommon.<sup>665</sup> Furthermore, where the spouses are older, their age appears to be a factor in reducing their perceived entitlement to their spouse's estate, at least where there are children from a previous union.<sup>666</sup>

Although many participants simply objected to the children being excluded at the expense of the second spouse in a later-life marriage, for some the sense of injustice was heightened when the second spouse had children who were perceived as being the ultimate beneficiaries. Carol makes the following observations:

But why would she want to disinherit her own children in favour of her new husband's children, with whom she has no mileage, no connection ... I think it would be OK if he had no children, it would ultimately come back to Mark and Lucy, that would be fair enough, but she would obviously have known that he had children so it's a shame that she wasn't more specific.

Carol's comments illustrate a number of points. Firstly, although the scenario made it clear that Kate's children were "disinherited" in favour of Kate's husband, Carol interpreted it as Kate having chosen Dave's children over her own, a decision she found difficult to comprehend. Secondly, in an illustration of just how little people understand of succession law, Carol suggested that, had Dave had no children, his estate would have gone to Kate's children. Thirdly, it underscores that Carol did recognise the legitimacy of the spouse's claim, just not that of his children.

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<sup>664</sup> The Office for National Statistics reported a 73% increase in the number of divorces among men age 60+ since 1991 in England and Wales (ONS, *Older People Divorcing Infographic* (2013), available at <http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/family-demography/older-people-divorcing/2011/info-older-people-divorcing.html>). The increase in divorce among those aged 65 and over has been greater than for the adult population as a whole, with the proportion of that age group who were divorced nearly doubling over the decade, from 5.2 % in 2001 to 8.7 % in 2011 (ONS *What Does the 2011 Census Tell us about Older People?* (2013), available at <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/ageing/articles/wha-does-the-2011-census-tell-us-about-older-people/2013-09-06>). Scottish figures reflect a similar trend (Family Law News Edinburgh, *Rise in Divorce Rates Amongst the Over 60s*, (2015), available at <http://www.familylawedinburgh.co.uk/Blog/Divorce/rise-in-divorce-rates-amongst-the-over-60s.html>).

<sup>665</sup> 61% of widows (male and female) in England and Wales are aged 75 and over (Age UK *Later Life in the United Kingdom*, (2017), available at [http://www.ageuk.org.uk/Documents/EN-GB/Factsheets/Later\\_Life\\_UK\\_factsheet.pdf?dtrk=true](http://www.ageuk.org.uk/Documents/EN-GB/Factsheets/Later_Life_UK_factsheet.pdf?dtrk=true)).

<sup>666</sup> Finch and Mason also found the second spouse's claim on resources amassed in the previous relationship to be somewhat "ambiguous" and concluded that first and second marriages were not quite equivalent for inheritance purposes (Finch and Mason (2000), 37).

### 5.3.5 Relationship length

The length of the parent-child relationship compared to the relationship between the new spouses was another factor that was seen to influence the respective claims of the spouse and children. As a general rule, the second spouse's entitlement grew with the passage of time, although this did not necessarily negate the claim of the children from the previous marriage. Nevertheless in scenario 3, where the deceased had been in a relationship with his third spouse for 15 years, the participants were less shocked to see the spouse inherit than they were in scenario 1, where the spouses had been together for three years. Caroline, for example, who was unequivocal that Kate had been wrong to provide for Dave ahead of her own children in scenario 1, was more nuanced in her view of scenario 3. While speculating that the children may "feel angry with Anna," she also acknowledged that "15 years is a relatively long time".

In contrast, in regard to scenario 1, while Mark stated that he hoped that the children would "want their mother to be happy and "not sackcloth and ashes for the rest of her life," he added:

I certainly don't think they should miss out on things where there is a history. I think leaving that to Johnny-come-lately, that's maybe a bit unfair, I think that would be a bit harsh.

Other participants expressed similar views. Olga, for example, remarked that "three years is a very short time," particularly as she had known the two adult children "for a long time;" while Lauren suggested a three-way split between Dave and the two children would be more reasonable, before adding "but even then, three years is not a long time is it."

The length of a marriage – particularly a second marriage – has been raised in other studies as a factor that influences conceptions of spousal entitlement.<sup>667</sup> It is an important –and ostensibly problematic –point as spousal entitlement is based on status alone and it is difficult to conceive of any benefit being derived from attempting to measure the "commitment" or "worth" of a marriage by applying a matrix of external factors. However, although participants returned frequently to the length of the

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<sup>667</sup> See for example NatCen study (2010), 41.

marriage, closer examination reveals that this factor – like the age at which the participants met – is *only* relevant where children are also present.

### 5.3.6 The presence of children

While the presence of children from a previous relationship negatively impacted perceptions of spousal entitlement, active participation in bringing up these children slightly mitigated this effect. By way of example, Caroline observed that it “would be different” if Dave had been with Kate for 20 years as “he may have played a more fatherly role to the children.” However, in Caroline’s view, where there was no opportunity for a parental-style relationship to have formed, the second spouse could not be relied on to pass on to the children.

### 5.4 No children from a prior relationship

Read in isolation, there is a danger that some of the data could be interpreted as indicative of an old-fashioned view: narratives to the effect that second spouses must “earn” their entitlement over time or by raising children sit uneasily with the modern understanding of family. However, close analysis revealed that this narrative emerged only when there were children from a previous relationship and, most importantly, spoke not to the new spouses’ relationship, but to the previously partnered spouse’s duty to balance his obligations to both his first family and his second family.

This hypothesis emerged through what Glaser and Strauss term “theoretical sampling,” the process through which theory evolves through the interplay between analysis and data collection.<sup>668</sup> In this instance, the theory began to develop through analysis of the first data sets, and an additional scenario was developed to test it further (scenario 7). In the new scenario, a second spouse inherited ahead of siblings upon the death of her husband, who did not have children. The spouses had been married for three years. The scenario was presented to the participants in Group 6, both of whom were entirely unperturbed by the outcome.<sup>669</sup> The discussion was brief and straightforward:

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<sup>668</sup> Glaser and Strauss in Bryman (2008), 415.

<sup>669</sup> This theory developed after analysing the data from the first groups and was not introduced until Group 6. The Group 7 participants did not use any scenarios due to literacy concerns and the opportunity to present the scenario did not arise in groups 8-11.

Gladys: I don't have a problem with that  
 Mark: I don't really have a problem with that either.

In other words, absent the presence of children from a previous marriage, the spouse's entitlement to inherit was absolute.

This is not to say that a spouse – first or subsequent – inheriting ahead of siblings and parents never caused disquiet. Douglas et al. report that a very short marriage led some participants to conclude that the spouse was not entitled to the full estate;<sup>670</sup> similarly, in my study, although the topic was not approached directly, Mary related a story of siblings who had been upset when their brother left his estate to a woman he met and married six months prior to his death:

The only one situation was my uncle, who was a bachelor for years. He retired and got married, right, when he was 65, 66. He was only married for six months and he passed away. He'd just changed his will. And everything went to the wife and her children. You know I wasn't upset, my mum wasn't bothered but his other sister was quite upset about that.

It is inevitable that no legal rule will create an outcome that is universally felt to be “just” in all circumstances. In general, the participants showed strong support for the spouse, a view that is echoed in other studies. Furthermore, this view is reflected in the reform proposals which, if implemented, will result in the spouse inheriting the whole of the net intestate estate where there are no children,<sup>671</sup> as opposed to having to share it with the deceased's siblings and/or parents as can happen under the current regime.<sup>672</sup>

## 5.5 Factors reducing the children's entitlement

The focus of this chapter has thus far been on understanding why participants commonly felt that the wrong outcome had been achieved when the children in scenarios 1, 3 and 4 were “disinherited” at the expense of the spouse. However, while the participants, in general, operated on the assumption that some form of “sharing”

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<sup>670</sup> NatCen (2010) study, 41.

<sup>671</sup> Succession (Scotland) Bill (draft) section 2(2) (2009 Reprt, Appendix A).

<sup>672</sup> 1964 Act s.2.

of the estate between the first and second family was desirable, they also identified three factors that could justify a departure from this norm: the relative wealth of the beneficiaries, the size of the deceased's estate and the deceased's testamentary freedom. Their understanding of testamentary freedom is particularly important as it differs significantly from the conventional understanding.

### 5.5.1. Testamentary freedom

Given the wide support that testamentary freedom enjoys,<sup>673</sup> it is unsurprising that a number of participants felt that it trumped the claim of a disappointed beneficiary, even where that disappointed beneficiary was the deceased's child. Olga, Lucy, Simon and Kathleen, for example, all pointed out that, as Kate, the protagonist in scenario 1, had made a will, it had to be respected, regardless of what they thought of her decision. However, as was discussed in Chapter 4, this respect for testamentary freedom was primarily rooted not in a sense that Kate could do as she pleased, but in a belief that she had made a just and informed decision that should not be supplanted by the judgement of a less informed third party. Olga speculated that Kate's children, Mark and Lucy, were perhaps "very wealthy" in their own right, while Carol suggested that they may have received "their inheritance" before their mother died. For her part, Lucy expressed confidence that Kate had "probably considered Mark and Lucy," but adding that she would "have a problem" with the outcome had David inherited the entire estate "in a default way."

### 5.5.2 The temporary nature of the spousal transfer

However, when discussing their *own* testamentary intentions (as opposed to those of the fictitious testators) a very different narrative emerged, specifically in regard to first families and second families. Of the 24 participants who had wills, the overwhelming majority (22) were still in a relationship with the other parent of their children (although one also had another child from an extra-marital relationship) and intended for their estate to pass first to their spouse and then to their children. Furthermore these participants also viewed their wills as being inexorably linked to their partner's. While conventional wisdom holds will-writing to be a highly individual act whereby people pronounce a final reckoning on friends and family, one

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<sup>673</sup> Chapter 4, p114.

of the most surprising findings of the study was the extent to which couples with children viewed will-writing as a joint undertaking.

This view manifested itself in two ways: firstly, in the language participants used to discuss their wills, a discourse replete with references to “our will” and “what we’ve done;” and secondly, in the common objective their wills expressed. While the question was not asked directly, no examples were found of couples where the partners had chosen entirely different beneficiaries. In this sense, the couples in the study saw their wills not as two distinct documents, but as a single document expressing their shared wishes. This is of course unproblematic where the spouses remained in a relationship or did not re-partner; however, where one spouse re-partners, questions arise as to which obligations that spouse owes to the pre-deceased spouse.

The question of obligation to a pre-deceased spouse arises in cases where the spousal transfer is regarded as both “conditional and temporary.”<sup>674</sup> It is contended that, in most intact families, this is the case. While the participants generally provided for their spouses in the first instance, they intended their children (and in some cases their grandchildren) to be the final beneficiaries of their “joint” will. This finding was not unexpected and has been documented in other studies.<sup>675</sup> Munro, for example, observed that in cases where an individual is “assumed to form a single, lifetime partnership,” the initial transfer of wealth between spouses can be “considered a temporary and transitional stage, before that person dies and the wealth passes on to the next generation.”<sup>676</sup> John expressed this view in the following terms:

I mean when I go Lynne will get any cash that I have and the house also, obviously ... It will all go to Lynne initially but there will be provision for our two daughters and then ultimately to the grandchildren. I can’t remember the detail ... whether we’ve already made a formal arrangement for the grandchildren ... but we did go to considerable lengths to make sure that as far as we understood things were relatively watertight and appropriate.

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<sup>674</sup> Munro (1988) at 432.

<sup>675</sup> See Finch and Mason (2000), 70 and 2009 Report at para 2.26. See also Chapter 4, 4.5.1.

<sup>676</sup> Munro (1988) at 432.

Other participants made similar remarks, with Moira, for example, saying “if I die first my husband would inherit from me and on his death my son would inherit.” In no sense did the spouses expect each other to conserve assets and income to pass on to the children, but they did expect that, where there were assets remaining, provision would be made for the children.<sup>677</sup>

### 5.5.3 Agreements between spouses

While the participants’ testamentary intentions were clear, how these intentions were to be implemented was often opaque since, as will be explained forthwith, a will (other than a mutual will) cannot bind a successor. Eight of the participants reported that, while their spouse was the “first” beneficiary, the estate would then pass to the children. Three of these eight believed that they had binding written agreements with their spouses,<sup>678</sup> while five simply stated that the property would pass first to the spouse and then to their children,<sup>679</sup> without explaining how this would be achieved. The following excerpt from Group 3 encapsulates some of the confusion and the (misplaced) certainty:

Interviewer: Could I ask you who you’ve provided for?

Maureen: If I die first - my husband probably will, we’ll see how it goes (laughs) - but my four children.

Interviewer: So as it stands at the moment it would go first to your husband and...

Maureen: Yes, and this is the advice of our solicitor, and then the four children.

Interviewer: And between the two of you, you have an understanding then that the other one has to pass on to the children after that?

Maureen: It’s in the will.

Interviewer: Anybody else?

Moira: My situation is similar. If I die first my husband would inherit from me and on his death my son would inherit.

David: We’re the same, each other and then the children.

When the participants were pressed as to how this outcome would be achieved, a palpable sense of unease settled over the group, with jokes being made about going home to check what was in the will.

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<sup>677</sup> This temporary nature of the spousal transfer was broached briefly by the Court of Appeal in *Ilott*. Counsel for the appellant argued that half of Mrs. Jackson’s estate was derived from the efforts of Mrs. Ilott’s late father and, as such, was partly intended for her. Although the court did not dismiss the validity of this argument, it held that there was nothing in the instant case to support such a claim

<sup>678</sup> Maureen, John, Gladys.

<sup>679</sup> David, Moira, Joan, Simon, Kevin.

The situation arose again in Group 5 and, when Gladys was asked to confirm that she simply had a non-binding agreement with her husband, she too maintained that she had a binding agreement incorporated into the will:

Interviewer: You mentioned a husband. Does your husband benefit as well or does it just go to the children?

Gladys: No, to my husband. To my husband. Well to each other and then to the children.

Interviewer: And then you just sort of agree...

Gladys: That whatever is there will be split.

Interviewer: And is that just what you have agreed with your husband or do you have something in writing...

Gladys: That's what we have written down.

These discussions presented an ethical dilemma: there was no reason not to take a group of educated people at their word and, without seeing the wills, it could not be definitively determined that their interpretation of their wills did not match the provisions that had been set down.<sup>680</sup> Nevertheless, there is certainly room to wonder whether the participants were simply describing an informal agreement they had with their spouse, rather than a mutual will (explained forthwith).

#### 5.5.4 Mirror wills and mutual wills

In discussing their wills, a number of participants employed the term “mirror will” or described their arrangements as “mutual,” and it appears that some participants felt this accorded their will a particular legal effect. Tom, for example, said that he and his wife had “mirror wills” and then later stressed the importance of being in concert with one's spouse:

The thing is you would have to agree that with your spouse and you would both have to be exactly of the same mind because one of you is going to go first and the whole estate is going to pass over to the other. So they've got to be able to have agreed these things so they are written in stone virtually.

Tom was clearly proud of having his affairs well in order, but other than his “mirror will” he did not mention any other mechanism that related to having matters “written in stone.”

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<sup>680</sup> It is possible that they had liferents or mutual wills (see 5.5.4 below).

While Tom – and other participants – may have believed a “mirror will” to impose an obligation on the surviving spouse, it is simply a popular term denoting identical wills each benefiting the other. The standard pattern would be spouses making identical wills, benefiting each other, whom failing their children. However, either party is free to amend his or her will without seeking permission from – or even notifying – the holder of the other “mirror” will. In other words, a mirror will in no way binds the surviving spouse to provide for an alternative beneficiary on her death.

It is also feasible that participants were confusing mirror wills with mutual wills. Unlike a mirror will, a mutual will is a legal instrument, albeit one that is largely considered moribund. In a 1986 Consultative Memorandum, the SLC described the mutual will in the following terms:<sup>681</sup>

A mutual will is a deed by two or more persons in which each disposes of all or part of his or her own estate to the survivors or survivor. The deed may also contain directions as to the disposition of the estates on the death of the survivor.

The SLC goes on to explain that mutual wills become contentious “when one of the persons concerned dies leaving a will inconsistent with the provisions of an earlier mutual will.”<sup>682</sup> In such cases, the question is whether the mutual will can be regarded as “merely two wills in one deed, in which case revocation is competent, or as contractual, in which case revocation or alteration is incompetent.”<sup>683</sup> While it is not beyond the realms of possibility that some of the participants had mutual wills, it seems highly unlikely given that, as far back as 1986, the SLC held that mutual wills had “ceased to be a feature of current practice.”<sup>684</sup> Nevertheless, many participants spoke as if they had just such an agreement in place, convinced that the surviving spouse was bound to honour its terms.<sup>685</sup>

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<sup>681</sup> SLC, *Some Miscellaneous Topics in the Law of Succession*, (Consultative Memorandum No. 71, 1986) at para 4.3.2.

<sup>682</sup> *Ibid.*

<sup>683</sup> *Ibid.*

<sup>684</sup> *Ibid* at 4.3.9.

<sup>685</sup> For a detailed and instructive analysis of mutual wills see Braun, A, “Revocability of mutual wills” in Reid, KGC, De Waal, MJ and Zimmerman, R (eds), *Exploring the Law of Succession: Studies National, Historical and Comparative* (Oxford University Press, 2007).

This question was explored further through discussion with the elite interviewees, all of whom were qualified Scottish solicitors. Lynne, the pilot interviewee for the elite interviews, had spent part of her career with a mid-size firm working in a generalist role. In discussing the issue of mirror wills, she made the following comments:

I would explain, because people would ask for a joint will, and I would explain that no, they would each do their own and they would use that expression, a mirror will. And I would say that all that means is that you have done a will in front of each other but ... one of you can go and change that will without the other one knowing ... I did emphasise that you are relying on that spouse to always see the children right because they don't get any of your money at that stage ... but you have to stress once it passes over the first time you've lost it, you cannot then tell them what they have to do when they die.

Lynne went on to add, however, that people rarely felt this advice applied to them:

The trouble is you don't need it at the time. They always just think well it's fine, we'll never fall out, nothing bad will happen ... or they take it on board but they trust their partner to do right by the children even if he did remarry. But then it can be something as simple as just forgetting to change a will.

Lynne's point is an important one. While – as Sally claimed to be her experience in making a will – some solicitors may fail to inform their clients that they have no control over how the surviving spouse disposes of his estate, others may simply dismiss the information as not relevant to them, later confusing their own belief that everything would be “OK” with a solicitor's assurance to that effect.

The pilot project for the elite interviews provided very valuable data, particularly as, in Lynne's words, she was involved in writing “bog standard” wills for “normal couples” rather than for the very well off. Her comments reinforce several important points that have been made thus far. Firstly, the term “mirror will” appears to have strong currency, although the people employing it often do not understand its lack of significance. Secondly, for many people, the spousal transfer is temporary and contingent in nature, with Lynne emphasizing that “people used to worry” about being unable to ensure their spouse would provide for their children. Finally, her comments stress that, contrary to the pervasive image of an elderly person calmly and thoughtfully putting his affairs in order, the reality is that will-writing is sometimes a

task performed by harried people in early middle life, happy to tick off one job and unlikely to revisit it in the future.

Group 3 participant, Kathleen, ironically one of the strongest supporters of testamentary freedom, illustrated this last point well:

Interviewer: Would you mind me asking who benefits under that will?

Kathleen: Dependants.

Interviewer: Dependants?

Kathleen: Yes. Don't ask me what's in it. I worked for a big firm in Glasgow when we bought our last house. We've been there 14 years and one of the perks of the job was free conveyancing so I took that up and along with it you got the offer of a will so we did that as well. But as I say, my husband really dealt with it and it was 14 years ago. But it's dependants though.

Interviewer: Just for clarification, does dependants mean your children?

Kathleen: Yes.

Interviewer: Does your husband benefit as well under it?

Kathleen: Yes, it's mutual.

The “one-off” nature of will-writing is an important point when it is considered that a common rejoinder to any criticism of the intestate succession regime is that “unjust results” can be avoided “through the simple expedience of making a will.”<sup>686</sup> Indeed, Norrie expressed the hope that the “Scottish Government and the legal profession make serious efforts to advise, encourage and persuade far more people to make a will than do so currently.”<sup>687</sup> However, while this is undoubtedly sound advice it does not address the issue of will-making not being an activity that people revisit.<sup>688</sup>

### 5.5.5 Non-binding agreements.

In contrast to the participants who believed their spouses to be bound by their mutual agreements, another group fully appreciated that any agreement they had with their spouse was not legally enforceable beyond death. In general, however, they considered this to be inconsequential as they viewed their morally binding agreement to be no less unassailable than a legal one. The sacrosanct nature of such agreements was referenced by Lauren in explaining her mother's testamentary intentions. Lauren's father died leaving his estate to his wife and, although Lauren's brother is

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<sup>686</sup> Norrie (2008), 80.

<sup>687</sup> *Ibid.*

<sup>688</sup> In my study alone, two remarked that their wills no longer reflected their testamentary intentions.

estranged from the family, her mother regularly reminds Lauren and her sister that her estate will be divided between the three children. Lauren attributed this decision both to the indestructible parent-child bond and to the agreement she had with her now deceased husband:

Oh, it's her boy, he's her boy. And that was my dad's, her and my dad's wishes and dad's not here so she has to follow it through.

In Lauren's view her mother's moral obligation is no less binding than a legal compulsion.

In addition to believing that testators were, in general, morally obliged to respect the pre-deceased spouse's wishes, several participants stressed that, in their own case, they trusted their spouse to respect their wishes. This trust was unsurprising in a relationship between two people who expected to spend their lives together. However, it also reflected the fact that many people had simply not given much thought to the eventuality of their spouse repartnering and, upon doing so, perhaps also choosing to renege on their agreement. Sally was shocked when she was struck by the realisation that she would have no control over her estate if it passed to her husband, exclaiming, "Damn you! I'll have to think about that now!"

Fellow Group 5 participant, Catriona, was equally surprised:

I hadn't thought of that aspect because I'm sitting here thinking I'd trust Oliver to be with someone sensible who would look after my kids and if she turned out to be a monster then the grandparents would intervene, or family would at some point, but actually if he dies and it gets left to some psycho to have my money and my kids...

Sally: I'm with you!

Although Catriona accepted the suggestion that the surviving spouse, the father of her children, may require the resources to bring up her children, Sally was troubled by the possibility of "losing control" of her estate for the remainder of the session and wondered why her solicitor had not raised the matter with her when the wills were being drafted.

Finally, some participants – or more precisely the mothers of some participants – were aware that the agreements they had with their spouses were non-binding after death and were consequently concerned that their partner would not implement them. Malcolm explained that, although his parents were still together and very united, his mother remained concerned about ensuring her children would be provided for:

On the point of trusting your husband, my mum and dad have spent the last 15 years trying to make a will. She's been married for 48 years and she still doesn't trust my father enough not to run off with a floozy in the event of her death and spend her children and her grandchildren's inheritance ... She's trying to insist that there's some sort of provision that, if she passed away before my father, a certain amount would have to be passed down to myself and my sister and the grandchildren.

While this exchange provoked a degree of hilarity, presumably on the basis that the participants felt that Malcolm's septuagenarian father was unlikely to embark on a new relationship if his wife died, older adults do form relationships in later life and there is no reason that Malcolm's father would not find himself in such a situation. Indeed, as the conversation progressed, the group accepted Gillian's view that perhaps Malcolm's mother wasn't "so daft" after all.

Lucy also discussed her mother's awareness of the fragility of any agreement brokered between spouses. Although Lucy's parents had been divorced for over a decade, their wills still benefited each other. However, in order to mitigate the effects of her ex-husband renegeing on their agreement, Lucy's mother herself renegeed on it, although at the expense of the ex-husband and not the children:

My mum has just changed her will because ... mum and dad have always had mirror wills. Basically, they used to be a couple who were together a long long time therefore they thought, you know, better that one of them lived the life that they thought they were going to have because it is a bit different to have to split it two ways. That was all very well and good: all the money would go to mum or all the money would go to dad and none of it would go to us at that point at all. And then my mum suddenly thought ... you know what, you just can't trust anyone, even if my dad didn't want that to happen, who knows what a partner might try and do. So my dad doesn't know this yet, but she has siphoned off part of that and said this much will go to my dad but actually this much will go directly to the children because otherwise she'd be worried that we may end up with nothing.

### 5.5.6 Testamentary freedom between spouses

The confusion surrounding will-writing and attendant obligations between spouses has been highlighted because it speaks volumes about the way in which couples—or at least couples with children—understand testamentary freedom. While several participants felt that it was hard to conceive of how a child could become absolutely undeserving, they did accept that parents could be justified in excluding their children. However, this was viewed as a decision the parents made together, prior to the death of the first spouse, and was not one the surviving spouse could make on his own without very good reason. Indeed, they disapproved strongly of those who did not honour informal spousal agreements, suggesting that couples understand their freedom to test to be mutually restricted. In other words, while “they” as a couple felt it was important that “they” enjoyed at least some testamentary freedom, no one suggested that the spouses, as individuals, had the freedom to dispose of what at once been “theirs” (as a couple) in the manner that they (as individuals) saw fit. In this sense, their understanding of testamentary freedom clearly did not correlate with the conventional narrative of individual expression, as there was no sense the surviving spouse had *carte blanche* to do what he saw fit with the assets following the pre-decease of the first spouse.

Of course, no single factor can be taken in isolation and, while several participants clearly felt strongly about the surviving spouse’s obligation to the first spouse, they understood both that absolute rights and wrongs rarely exist, and that the vagaries of life might temper that obligation. David, for example, pointed out that circumstances could arise that would justify a departure from the spousal agreement:

I would have thought that John could certainly have been criticized for not following through on the agreement, but with the qualification that a certain amount depends on his new wife’s circumstances.

Maintaining a legal share for children allows the law to balance the testamentary freedom of the testator, while also recognising that, in many cases, the estate that

became the testator's was given to him on the understanding that at least some of it would be passed on to the pre-deceased spouse's children.<sup>689</sup>

## 5.6 Balancing competing needs

My research project started from the premise that the spouse's entitlement to a share of the deceased's estate is indisputable. However, while the spouse's claim is considered virtually unassailable, this is not to say that it is considered to be the *only* legitimate claim. The findings discussed above demonstrate clearly that children are also considered to have a claim, albeit one that is deferred to the claim of the child's other parent. The factors that underpin this claim, while potentially applicable in the context of "intact" families, assume a particular importance in first family/second family dynamics.

In this sense, first marriages are different from second marriages in an inheritance context. This difference in no way speaks to a difference in the worth of the two marriages but is instead purely pragmatic: the deceased has ties to two family units and, given the normative expectations that exist, must take measure to provide for both. In cases of testamentary succession, this can be done by will-writing or by making the appropriate non-testamentary provision; in the case of intestacy, the responsibility of ensuring a "just" outcome falls on the state.

### 5.6.1 Two intestacy regimes

In some jurisdictions, attempts are made to balance the "entitlements" of first families and second families by creating a separate intestacy regime that operates when the surviving spouse is not also the other parent of the deceased's children. The Canadian province of British Columbia is a case in point. British Columbia recently undertook extensive reform of its succession laws, and one of the principal changes means that the law now prescribes different divisions where the surviving spouse is not also the parent of the deceased's children. Under the province's new succession Act, where all

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<sup>689</sup> The value of a fixed share approach was underscored in *Ilott* where Lady Hale recognised that "a respectable case" could be made for at least three very different outcomes: making no order, making the more generous order handed down by the Court of Appeal; or, making the original order of £50,000. In many cases - as in *Ilott* - there is no obvious "right" amount for a claimant to be awarded and a fixed share provides a compromise solution that is easy to administer and guarantees at least some recognition for both spouses and children.

descendants are common to both the intestate and the spouse, the spouse's preferential share is \$300,000;<sup>690</sup> in contrast, where the surviving spouse is not also the parent of all of the intestate's children, the preferential share is reduced to \$150,000.<sup>691</sup> The residue of the intestate estate is then split equally with one half to the spouse and one half to the children.<sup>692</sup> The spouse also has the right to purchase the spousal home if the fair market value of the deceased's interest in the spousal home exceeds the value of the surviving spouse's interest in the estate.<sup>693</sup>

In the lengthy report accompanying the reform proposals this point—so contentious in the Scottish and wider British context—received scant attention. In explaining its rationale the Report stated simply that the preferential share should be reduced as “the natural children of the deceased could not normally expect to inherit from the spouse and should in fairness receive some of the estate.”<sup>694</sup> Perhaps one of the reasons why this change was uncontroversial is that it has already been implemented in other Canadian provinces,<sup>695</sup> as well as in those US states adhering to the Uniform Probate Code (UPC).<sup>696</sup>

In Australia, a similar approach was proposed by the National Law Reform Commission in 2007<sup>697</sup> and has subsequently been adopted by New South Wales<sup>698</sup>

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<sup>690</sup> Wills, Estates and Succession Act [SBC 2009] (WESA) s 21(3). Note that a first quarter 2015 report released by the Canadian federal government estimated that the average house price in BC would be \$577,700 for 2015 and \$588,000 for 2016, meaning that the BC spousal share is worth considerably less than its Scottish equivalent (Canadian Mortgage and Housing Corporation, *Housing Market Outlook: British Columbia Region Highlights* (4<sup>th</sup> Quarter 2016), 2, available at [https://www.cmhc-schl.gc.ca/odpub/esub/65442/65442\\_2016\\_B02.pdf?fr=1495915556773](https://www.cmhc-schl.gc.ca/odpub/esub/65442/65442_2016_B02.pdf?fr=1495915556773)).

<sup>691</sup> WESA s 21(4).

<sup>692</sup> WESA s 21(6)(b).

<sup>693</sup> WESA s 31.

<sup>694</sup> BCLI, xvii.

<sup>695</sup> See, for example, *Wills and Succession Act* (Alberta) s 61 or *The Intestate Succession Act* (Manitoba) s 2(3).

<sup>696</sup> Section 2-102 of the UPC provides four different threshold sums depending on the family circumstances of the deceased: the entire estate where all of the decedent's surviving descendants are also descendants of the surviving spouse; \$300,000 plus  $\frac{3}{4}$  of the balance of the intestate estate where no descendant of the decedent survives the decedent, but a parent of the decedent does; \$225,000 plus  $\frac{1}{2}$  of any balance of the intestate estate where all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent; and, \$150,000, plus one-half of any balance of the intestate estate, where one or more of the decedent's surviving descendants are not descendants of the surviving spouse. These amendments were introduced in 1990 to address the “multiple marriage society” and the “children-of-previous-marriages and stepchildren phenomena” (annotated version of UPC, last amended 2010, 24).

<sup>697</sup> New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy* (Report 116, 2007) at 3.76.

and Tasmania.<sup>699</sup> It should be noted that, unlike the British Columbian model, or that contained in the UPC, the spouse's statutory legacy in the Australian National Law Reform model comes into play only when the surviving spouse is not also the other parent of the deceased's children. The surviving spouse inherits the entire estate if the surviving spouse is the deceased children's other parent, and the children are given a share of the residue where this is not the case.<sup>700</sup>

The Law Commission of England and Wales also considered this option, albeit indirectly, by discussing whether the rules of intestacy should reflect the concerns of conduit theory. While the Law Commission ultimately decided not to address these concerns in its reform process, the reasons behind its decision are not unassailable. The Law Commission argued –correctly – that “even if the surviving spouse is the parent of the deceased's children, he or she may remarry ... or simply fall out with the children potentially diverting ... the deceased's wealth to a new partner or other beneficiary on ... her death.”<sup>701</sup> However, the fact that the intestacy regime will not come into play if the deceased has written a will is no reason not to incorporate conduit theory into the law of intestate succession. Furthermore, it is precisely because the deceased may remarry that it is important that the principle be reflected in the intestacy regime.

Secondly, and more importantly, the Law Commission held that it was “wrong in principle for the entitlement of one spouse to differ from that of another because of the presence of children from other relationships.”<sup>702</sup> This is a robust sounding statement yet it is one that is never elucidated. This is problematic when it is considered that other jurisdictions, such as those discussed above, clearly approach the question from the stance that it would be wrong “in principle” *not* to recognise that the spouse's entitlement is different in such circumstances.

In the Scottish context, the SLC argued that no distinction should be made between

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<sup>698</sup> Succession Amendment (Intestacy) Act 2009 s 113.

<sup>699</sup> Intestacy Act 2010 s 14.

<sup>700</sup> See for example, *Intestacy Act 2010* (Tasmania) ss 13 and 14.

<sup>701</sup> 2011 Report at 2.68.

<sup>702</sup> *Ibid.*

“different types” of surviving spouse,<sup>703</sup> as succession rights arise solely from the spouse’s legal relationship.<sup>704</sup> This is true, but is not an immutable or universal truth: in some jurisdictions, automatic intestacy rights also exist for cohabitants.<sup>705</sup>

However, and more importantly, the spouse’s rights in the BC and Australian models described above still arise from the spouse’s legal relationship; the distinction is simply between spouses who have other families and those who do not. For many people this is simply a fact of life rather than a legal slight against spouses who are not also the parent of their partner’s children.

Furthermore, as the SLC recognised that such family configurations are increasingly prevalent, it seems inappropriate to cleave to a statutory regime predicated on the increasingly outdated model of the nuclear family. As this model becomes less common, testators (and the law) cannot simply approach inheritance as a “family” matter, but must approach the two strands of the family separately. If the deceased relates to his children and his spouse as two separate family units there is no reason why the law should not follow suit.

### 5.6.2 Alternate models

While the British Columbian model offers clear advantages, it is not a panacea. The threshold amount, although much lower than the one proposed for Scotland, still means that the children of those who leave only small estates will be left with nothing. This particular difficulty could be addressed by introducing a sliding scale, with an increase in the percentage awarded to the children according to the size of the estate. This would provide recognition of the parent-child relationship while also meeting the policy objective of ensuring the spouse does not suffer financial hardship. By way of example, the following shares have been proposed:<sup>706</sup>

For instance, up to £100,000 just 1% or £1000 could be shared between any

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<sup>703</sup> Miss Scobbie argued that the SLC’s thinking on this point was “a bit flawed.” Her view was that, in practical terms, first marriages and second marriages are different, as resources that would otherwise have passed to the second marriage have been spent (and may continue to be spent) on the first marriage. In her view, the SLC chose not to distinguish between first and second marriages primarily for reasons related to ease of administration and simplicity.

<sup>704</sup> *Ibid* at 2.30

<sup>705</sup> See, for example, the Intestate Succession Act 1996 (Saskatchewan), which defines spouse to include cohabitants (section 2).

<sup>706</sup> Reid and Sweeney (2015) at 420.

children; and from £100,000 up to £250,000 (which takes the figures above the average estate) children could receive 5%; and thereafter rising to 24% or 30% for larger estates.

It seems unlikely that, even in very modest estates, the loss of 1% would make a significant difference to the survivor's wellbeing.

A second option would be to incorporate principles of matrimonial property into the law of succession. As is discussed below,<sup>707</sup> Scottish family law recognises a community of acquests principle for divorcing couples. This principle means that there is a presumption of equal sharing in assets acquired during the marriage with exceptions for gifts, inheritance and property previously owned by either party.<sup>708</sup> Incorporating this principle into the law of succession would offer “a rational system for apportioning family property between, for instance, the claims of a second spouse after a brief marriage in competition with children of a previous lengthy marriage, which had generated most of that property.”<sup>709</sup>

A third partial solution – and the only one considered by the SLC – is to adapt the way in which the intestacy regime operates when a survivorship destination is in force. According to figures reported by the SLC, about three quarters of Scottish homes that are owned in common by spouses include a survivorship destination.<sup>710</sup> This means that, upon death, the deceased's share passes automatically to the survivor and does not constitute part of the deceased's estate. The SLC recognised that, in such cases, the policy objective of allowing the surviving spouse to remain in the family home is met and that the deceased's issue would be unduly prejudiced if the surviving spouse were to get both the threshold sum and the deceased's *pro indiviso* share by survivorship destination.<sup>711</sup> Consequently, the draft bill proposed a clause reducing the threshold sum by the net value of the surviving spouse's right under the survivorship destination.<sup>712</sup> This is a laudable step, but does not address the consequences of the threshold sum being set as high as it is and does not, of course, provide any assistance in those cases where a survivorship destination is not in force.

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<sup>707</sup> See 5.9

<sup>708</sup> FLSA 1985 s 25(1).

<sup>709</sup> Reid (2008) at 416.

<sup>710</sup> 2009 Report at 2.19.

<sup>711</sup> *Ibid* at 2.21.

<sup>712</sup> Draft bill, section 3.

It is unfortunate that these issues were not explored in greater detail as they could potentially have enabled the SLC to develop a model better suited to meet the diverse needs of today's heterogeneous families. However, in order to determine the best way to strike an appropriate balance between the needs of first and second families, important questions must first be asked: does the current existence of legal rights significantly impact on poverty levels amongst widows? Are spouses being forced to leave their homes to meet claims for legal rights? At what level could legal rights be set to ensure that the majority of spouses would not see a drop in their standard of living?

The answers to these questions require further research but are important in order to allow for an informed debate. While participants were unanimous that spouses should not be "left without a roof over their head," it is not clear that this can only be achieved by leaving everything to the spouse.<sup>713</sup> Furthermore, it is not clear that financial need is the only reason spouses want to resist claims for legal rights: Lynne, the pilot expert interviewee, recounted that the only time she had seen a claim for legal rights cause tension related not to financial hardship but to mutual personal dislike between the son from the first marriage and the second spouse.

## 5.7 In-laws

Although the focus of this chapter has been on first family/second family dynamics when the *deceased* is the common link between the two families, the participants in Group 7 also viewed the question from an alternative perspective: the "threat" posed when the deceased's child – the intended beneficiary – had both a first family and a second family. Indeed, four of the seven participants in Group 7 expressed concern that their estate would in some way benefit their child's ex-spouse. They raised two

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<sup>713</sup> Liferents would also achieve this objective. However, although recognising that it was "not uncommon" for "wealthy" people in second marriages to use liferents, the SLC took the view that liferents suffered from "serious disadvantages" (DP 136 at 2.40). The experts interviewed for this project did not fully subscribe to this view. Although Miss Scobbie acknowledged that liferents were not necessarily "tax efficient" and could cause "frustration" for a surviving spouse who wanted to access the capital, she felt they were an effective means of providing for the spouse while preserving capital for the children, particularly where the surviving spouse benefited from a good occupational pension. Professor Gretton had no concluded view about liferents, but thought that their benefits tend to be underestimated and their drawbacks tend to be overestimated. He also saw no merit in the idea that a liferent undermines the autonomy of the surviving spouse.

related, but nonetheless distinct, concerns. Firstly, Jim was concerned that, if he died and passed on to his children, he would be unable to ensure that the estate would benefit his grandchildren rather than his son's spouse, if at any time she were to become an ex-spouse. Secondly, Alec and Cyril were concerned that their respective children's ex-spouses would be able to make a claim on their estates when they died.

The first concern was not entirely unexpected, as I had previously heard it discussed anecdotally. Matrimonial law defines matrimonial property as all property belonging to either party that was acquired during the marriage, or before the marriage for use by both spouses as a family home or furnishing for such a home.<sup>714</sup> Amongst the assets excluded from family property are assets acquired by way of gift or inheritance from a third party.<sup>715</sup> However, if such "non-matrimonial" property is sold and used to buy something else then that item becomes matrimonial property for the purposes of dividing the assets upon divorce.<sup>716</sup>

The second concern was more unexpected – as it was unfounded – but it was nonetheless a source of genuine and serious concern for the participants. These men were of an age and social background where they clearly considered divorce and separation to be a modern phenomenon, unconnected to their lives; as Alec observed, "I think young people nowadays, divorce is more the norm ... we would never have thought of divorce". However, they were deeply concerned by their children's divorces and the impact that they would have on their children's and grandchildren's inheritances. Although their concerns were unwarranted, they had a very strong fear that former sons and daughters in-law would have a claim on their estate.

Alec and Cyril explained at length the steps they had taken with a view to preventing such a claim from being made:

Alec: She hasnae got a claim. Well, she's no goin' to have a claim on anything because that's been written in. Grace deals with the wills and believe me

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<sup>714</sup> FLSA 1985 s.10(4).

<sup>715</sup> *Ibid.*

<sup>716</sup> While the principle of fair sharing is presumed to be equal sharing under s 10(1) of the FLSA this can be rebutted if special circumstances apply. The source of the asset can be a special circumstance and so although the new asset might be matrimonial property it might not be fair to share it equally. See discussion of special circumstances in *Latter v Latter* 1990 SLT 805 at 808.

Grace has made sure that this will ... the guy came in from Glasgow ... and we made sure that nothing can go to the first wife of my son. Nothing. And it's been written in such a manner ... I get very bitter thinking that my children's previous partners could have a snippet of a chance ... very bitter. And I know for a fact that anything I've given my grandchildren on my son's marriage, she dips into to buy frigging motorbikes and things like that. And that's where it gets very contentious. And I get very bitter about a will and I try to keep it as simple for me as I can.

Similarly, Cyril stated:

I was just going to say, when I went to the lawyer to make up my will. My elder daughter, she had been married twice, divorced once and separated, right, one child from the first marriage, right, so I went to make sure that her second husband that she's separated from had no claim on anything there.. and that was my big concern. I know the first one's out the window because he's remarried and got children, right, but as far as my elder daughter's concerned, if I want to make sure that it's my elder daughter, my two daughters, especially my elder daughter and also my grandchildren who benefit. No' any part of his family to become involved.

In these instances, Alec's son and Cyril's daughter had already separated and so the "relevant date" for the purposes of assessing the matrimonial property had also passed.<sup>717</sup> As Alec and Cyril are still alive, any assets their children inherit from them in the future cannot therefore be considered matrimonial property of those relationships. Despite this, their concerns were very real.

The men debated the point passionately and fell into an argument about the best way to address it. Jim was adamant that the best way to avoid an in-law who was likely to become an ex from leaving the marriage with any assets that formerly belonged to the testator was to make a direct bequest to the grandchildren. Neil supported this view, adding that the issue had prayed on his mind since the separation of one of his daughters. Neil and Jim's views were however spiritedly rejected by Alec:

To me it's more simplistic to leave it to your children. Because my son has now got a son of nine months. And I've got a grandson from his first marriage of 21 and one of 14. So it is better for him to decide how the money goes than for me to turn around and give it to the grandchildren because the first thing that I

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<sup>717</sup> FLSA s 10(3) defines the relevant date as the earlier of the date on which the parties cease to cohabit or the date of service of the summons in the action for divorce.

would see is the mother of the first two boys getting into the kitty and that I just don't want.

Aside from highlighting the hazy understanding of inheritance law that the public has, these comments underscored many of the points made by other commentators. Here the participants were “constituting kin relationships”<sup>718</sup> through the act of making testamentary provision; they were choosing to privilege the project of self to which ...[they]... attach most significance during their lives;<sup>719</sup> and they were expressing horror at the money “passing out” of the family.<sup>720</sup> Even more strikingly, and perhaps somewhat harshly, they highlighted the centrality and permanency of the parent/child/grandchild relationship in contrast to the spousal relationship which, at least from the extended family's view point, can evaporate as soon as the legal tie is severed.

### 5.8 Extra-marital children

In an unexpectedly candid discussion, Alec revealed that he had a child from an extra-marital relationship. Here his dilemma was similar to that raised in a first family/second family scenario, but viewed from an alternative angle as the second family was represented by *issue*, not a second spouse. Alec was clear that he had a duty to the son, whom he loved, but he also realised that, had he not had this relationship, his wife would not be in the position of seeing her children (and Alec's other children) being provided with less on his death due to the overall pot being shared with an “extra” person.

As a result, Alec and his wife had made complex calculations to notionally divide assets into those belonging to his wife – that would be divided between their two children –and those that belonged to him, that were also available to the third child. It would appear that some assets were transferred legally into his wife's name to ensure they were not available for legal rights:

You see, I have a problem with that. When you read my piece of paper ... I have a child outside of marriage, he's 31. Now, although there would be

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<sup>718</sup> Finch and Mason (2000), 12.

<sup>719</sup> Douglas et al. (2011) at 247.

<sup>720</sup> Finch and Mason (2000), 40.

something left to Stuart, but because he's been brought up down in England and I see him regularly, as regularly as you can from Scotland to England, and I love him dearly. But my children are my two children if you follow me. When we had something drawn up it was like doing the bloody lottery. You get a percentage of this and a percentage of that and Stuart got a sum of money that was based on a percentage of what my other two would get. In other words, if my other two were getting 40% of what I owned or what Grace owned depending on who died, Stuart would get 20% and that was drawn up in some sort of format ... Is that good and proper?..... It doesn't matter how much your wife loves you or thinks ... you know ... it becomes a wee bit ... she only sees two children whereas I see three. Do you follow me? That's where inheritance becomes contentious

Alec's dilemma was not purely about his duty to his children but also, and perhaps most importantly, to his spouse. As was discussed above, many spouses conceptualise their assets as belonging to the family unit and plan for them ultimately to pass to the children. By having an "extra" child, Alec had "wronged" his wife by diverting resources to another family, but found himself torn as he realised it would equally be "wrong" to ignore his responsibilities to the second family.

## 5.9 Conclusion

My research findings clearly indicate that, in all but the most exceptional circumstances, parents are considered to have a duty to provide for their children. This duty stems from the coalescence of multiple factors<sup>721</sup> but, in its essence, reflects the desire most parents have to show their love and do "the right thing."<sup>722</sup> However, the research also indicated that giving effect to this parental obligation operates differently depending on family configuration: in the context of a second family formed following divorce or separation, each parent must independently take steps to fulfil the obligation; in contrast, in an intact family, the parental obligation to the child is "passed on" to the surviving spouse, becoming relevant only upon the death of the second parent. Of course, the line separating "intact" families from "complex" families is not inviolable and second families may also be created when a member of a formerly "intact" family re-partners after widowhood. This creates a new inheritance dynamic and, in such instances, the surviving spouse must "pass on" to fulfil not only his parental obligation but also his obligation to his pre-deceased spouse.

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<sup>721</sup> See generally Chapter 4.

<sup>722</sup> Douglas et al. (2011) at 247.

Succession law can give effect to society's normative expectations of parents in second relationships in two ways. In the case of intestate succession, the legislative framework can be designed in such a manner as to reflect the deceased's obligation to both of his family units, for example, by varying the spouse's entitlement according to whether he is also the other parent of the deceased's children. In cases of testate succession, the continued existence of legal rights would provide assistance by restricting otherwise unfettered testamentary freedom. This restriction is important since, as has been shown, when an estate passes to a surviving spouse it is often on the understanding that the survivor will subsequently give effect to the predeceasing spouse's wishes. Preserving legal rights means that, even if the surviving spouse chooses not to respect the predeceased spouse's wishes, the law will provide a remedy that balances testamentary freedom with the perceived entitlements of the first family.<sup>723</sup>

However, despite the clear consensus that exists regarding the children's entitlement in a first family/second family context, the SLC chose to disregard the issue. As the incidence of such family formations is on the rise, it is difficult to see in what way this decision will render the proposed succession regime more responsive to the needs of twenty-first century families.

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<sup>723</sup> As legal rights do not prescribe for 20 years after becoming enforceable (Prescription and Limitation (Scotland) Act 1973 s.7, Sched. 1, para 2(f)), the children can, as Miss pointed out, delay making a claim until the surviving parent re-partners and threatens the operation of conduit theory.

## CHAPTER 6: RECONSTITUTED FAMILIES

### 6.1 Introduction

The previous chapter examined the impact of the current succession regime and the proposed reforms on those who are part of a first family/second family dynamic. In such instances, the first family and the second family were viewed as two entirely distinct units: the children had never shared a home with the new spouses; the new spouse had played no parental role in the children's lives; and, indeed, the children and the second spouse had perhaps never even met. However, there are also many instances where a parent re-partners when children are young, creating what is often referred to as a stepfamily. Moreover, as well as introducing new "parental" relationships, these family units can also give rise to stepsibling and half-sibling relationships. It is these reconstituted families that will be considered in this chapter, beginning with stepfamilies.

Data on stepfamilies is notoriously difficult to gather.<sup>724</sup> The National Records of Scotland pointed out that this is in part because of the "different ways in which families of this type classify themselves." It contended that "the parents in many of these families are not married and, as a result of this and the negative imagery associated with step-parents, do not classify the children as stepchildren but either as their own children or unrelated."<sup>725</sup> Some information is nevertheless available. According to the 2011 Census, stepfamilies make up 8% of married couple families and 29% of cohabiting couple families in Scotland,<sup>726</sup> and 10% of married couple families and 24% of cohabiting couple families in England.<sup>727</sup> Overall, 11% of couple

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<sup>724</sup> The Office for National Statistics (ONS), for example, noted that the 2001 Census was the first census to identify stepfamilies (ONS, *Focus on families* (2007), 5, available at <http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/family-demography/focus-on-families/2007/index.html>).

<sup>725</sup> National Records of Scotland, *Other Households: Census Results 1981-2001*, available at <https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/housholds/occasional-papers/household-change/scotlands-place-in-the-uk-and-ireland/other-households>.

<sup>726</sup> Scottish Government, *Census 2011: Detailed characteristics on Population and Households in Scotland*, Release 3E, (2014), available at <http://www.scotlandscensus.gov.uk/news/census-2011-detailed-characteristics-population-and-households-scotland-release-3e>.

<sup>727</sup> ONS, *Stepfamilies in 2011* (2014), 5, available at [http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/dcp171776\\_360784.pdf](http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/dcp171776_360784.pdf).

families with dependent children in England and Wales<sup>728</sup> and 12 % in Scotland<sup>729</sup> were stepfamilies in 2011.

However, even if all stepfamilies self-identified according to National Records of Scotland criteria, these figures would still offer only an incomplete picture. As the Census figures apply only to families “living in households” with dependent children,<sup>730</sup> it is almost inevitable that they provide a conservative estimate. For example, they shed no light on the number of non-dependent children who are part of stepfamilies,<sup>731</sup> or indeed the number of dependent children who are part of stepfamilies but who do not live with a step-parent, either because they live with their other parent in a lone parent family unit or because the step-parent and the parent have ended their relationship.

Other questions abound: can adults become stepchildren; at what point is the step-parent/stepchild relationship formed; and, perhaps most importantly, does the relationship exist independently of the step-parent and the biological (or legal) parent’s relationship, in the way that a parent/child relationship exists independently of the parents’ marriage, or is it a relationship that lives and dies by the success of the spouses’ relationship? These are some of the questions will be considered in this chapter.

## 6.2 What is a stepfamily?

In general, the definitions of step-parent and stepchild seem to be more tightly circumscribed than definitions of the term stepfamily. The *Oxford English Dictionary* offers only the tersest of explanations of step-parent and stepchild, defining a step-father as “a man who has married one’s mother after one’s father’s death or divorce” and a stepson as “a son, by a former marriage of one’s husband or wife.”<sup>732</sup> These limited and rather dated definitions, reflecting historical legal definitions that placed

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<sup>728</sup> *Ibid*, 1.

<sup>729</sup> Calculation based on figures provided in Scottish Government Release 3E (2014).

<sup>730</sup> Scottish Government Release 3E (2014).

<sup>731</sup> The 2001 census did provide some information on non-dependent children in stepfamilies, but non-dependent children were narrowly defined as “children aged 16 and over living with their parent(s) who have no spouse, partner or child living in the household.” In other words, the definition did not include adult children who had formed their own family (ONS (2007), 3).

<sup>732</sup> *The Oxford English Dictionary* (Oxford University Press, 2017) (on-line version).

the onus on marriage as creating the steprelationship, stand in contrast to the more inclusive definition the dictionary provides for the stepfamily:<sup>733</sup>

A family with one or more stepchildren; a family in which at least one of the adult partners has children from a previous relationship or marriage (though not necessarily living in the same household).

The contrast between the narrowly delineated definitions of stepchild and step-parent and the broader, more amorphous definition of stepfamily encapsulates the tension between the way in which the law defines steprelationships and their broader social meaning. The divergence between the two meanings of the term will be discussed forthwith.

### 6.2.1 The legal definition

Despite the regularity with which the terms “stepchild” and “step-parent” feature in discussions about inheritance and family law, they rarely appear in Scottish statutes. Some of the limited examples include the Burial and Cremation (Scotland) Act 2016,<sup>734</sup> the Damages (Scotland) Act 1976 (and its successor the Damages (Scotland) Act 2011)<sup>735</sup> and the Adoption and Children (Scotland) Act 2007,<sup>736</sup> none of which define the term. The traditional reference sources provide equally little assistance. *The Law Relating to Parent and Child in Scotland*,<sup>737</sup> for example, does not discuss the question of step-parents while *The Stair Memorial Encyclopaedia* provides little more insight than the *Oxford English Dictionary*: it is unequivocal that a step-parent is someone who is “married” to the other parent<sup>738</sup> but sheds no light on the gulf between the legal and social meanings of the term.<sup>739</sup> Given the absence of any contrary authoritative examples, it must be assumed that the narrow, affinity-based definition is unassailable in law. The case law that has developed around the statutes,

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<sup>733</sup> The *OED*'s definition of stepfamily is broad enough to encompass the definition of first family/second families included at 6.1, but a distinction will continue to be made between the two for the purposes of this thesis.

<sup>734</sup> Section 65(5)(b) stipulates that the stepchild of an adult is to be treated as the child of the adult for the purposes of subsection 3.

<sup>735</sup> Section 14(2)(b) states that a stepchild is to be treated as a person's child.

<sup>736</sup> The Adoption and Children (Scotland) Act 2007 includes several references to step-parents.

<sup>737</sup> Wilkinson, AB and Norrie, KMcK, *The Law Relating to Parent and Child in Scotland* (3<sup>rd</sup> edition, W. Green, 2013).

<sup>738</sup> Sutherland (2004) at para 106.

<sup>739</sup> Unlike the *OED*, Sutherland also extends the affinity-based definition to the term stepfamily, which she distinguishes from “cohabitation-based” de facto stepfamilies (Sutherland (2004) at 70).

however, illustrates the difficulty of adhering to this approach in contemporary society.

These difficulties came to the fore in *McGibbon v McAllister*<sup>740</sup> when the pursuer sued for damages under section 1(4) of the Damages (Scotland) Act 1976 (the 1976 Act) following the death of his *de facto* stepson in 2004.<sup>741</sup> Although the statute specifically mentioned the term “stepchild” (but did not define it), it was the meaning of the term step-parent—a term *not* used in the Act—that proved problematic. Section 1(4) of the 1976 Act<sup>742</sup> provided for damages for non-patrimonial loss to be awarded to relatives of the deceased’s immediate family, “relative” being defined in Schedule 1 to the Act.<sup>743</sup> At that time, although “relative” included step-parents,<sup>744</sup> stepchildren<sup>745</sup> and *de facto* stepchildren,<sup>746</sup> it did not include *de facto* step-parents.

This anomaly was corrected by section 35(5) of the Family Law (Scotland) Act 2006, which added four new categories to the list of relatives who count as immediate family, including persons who accepted the deceased as a child of their family.<sup>747</sup> The amendment was introduced with a view to changing the eligibility test for damages from one of affinity to one of acceptance. As Norrie explained, this was because the law in force at the time was both over-inclusive and under-inclusive.<sup>748</sup>

It was over-inclusive in that it permitted pursuers to trace their claim through relationships of affinity even where there was in reality no genuine closeness with the deceased that would justify an award for non-patrimonial loss. And it was under-inclusive in that it excluded persons who did have that genuine closeness through having accepted the deceased as a child of the family.

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<sup>740</sup> 2008 SLT 459.

<sup>741</sup> For a detailed synopsis of the case see Mair, J, “Parents and parenting: *McGibbon v McAllister*” (2008) 12 *Edinburgh Law Review* 442.

<sup>742</sup> Since repealed and replaced by Schedule 2 to the Damages (Scotland) Act 2011.

<sup>743</sup> *McGibbon v McAllister* at para 6.

<sup>744</sup> Sch 1, s 1(b) provided that any person who was a parent or child of the deceased was classed as a relative while s 2(a) provided that any relationship by affinity was to be treated as a relationship by consanguinity.

<sup>745</sup> Sch 1, s 2(b).

<sup>746</sup> Sch 1, s 1(c).

<sup>747</sup> Norrie, KMCK, “Rushed law and wrongful death” (2006) 51 *Journal of the Law Society of Scotland* 24.

<sup>748</sup> Norrie, KMCK, “When parliament gets it wrong: *Mykoliw v Botterill*” (2011) 15 *Edinburgh Law Review* 103 at 104.

Unfortunately, the amendment, which applied only to deaths that occurred after 4 May 2006, was of no assistance to Mr. McGibbon whose *de facto* stepchild had died in 2004. Nevertheless, Mr. McGibbon was granted title to sue as an ordinary reading of the 1976 Act was found to be incompatible with the ECHR.<sup>749</sup>

### 6.2.2 The social definition

Although the marriage-based *legal* definition of the term step-parent seems utterly entrenched, wider society does not appear to adhere to this view. Indeed, although the question was not specifically tested in my study, the participants gave no indication that they held marriage to be the *sine qua non* of a stepfamily relationship. Similarly, government and policymakers do not appear to distinguish between marriage and cohabitation-based steprelationships. In the Scottish Government's Social Attitudes Survey 2004, for example, the term stepfather was used to refer to both to a man who had married the biological mother and to a man who had treated the child as his own for five years.<sup>750</sup> Likewise, in the Scottish Government's summary of the 2011 Census findings, the term stepfamilies referred both to married couple families and cohabiting couple families.<sup>751</sup> Other stakeholder policy documents,<sup>752</sup> law firm websites<sup>753</sup> and regular press commentary appear to use the same wide definition.<sup>754</sup>

The legal community is sensitive to this disconnect and, in its *Report on Title to Sue for Non-Patrimonial Loss*, the SLC argued that the existing definition of immediate family needed to be updated to “reflect the family structures found in contemporary Scotland.”<sup>755</sup> In its analysis of the legal definition of the term stepfamily, the SLC highlighted the inappropriateness of treating all “reconstituted” families alike:<sup>756</sup>

<sup>749</sup> *McGibbon v McAllister* at para 22.

<sup>750</sup> Scottish Government, *Scottish Social Attitudes Survey 2004: Family Module Report* (2005) at para 4.1, available at <http://www.gov.scot/Publications/2005/08/02131208/12092>.

<sup>751</sup> Scottish Government, Release 3E (2014).

<sup>752</sup> Capability Scotland, *Together and Apart: Supporting Families Through Change* (2011), available at [http://www.capability-scotland.org.uk/media/101061/about\\_families\\_report\\_2\\_change.pdf](http://www.capability-scotland.org.uk/media/101061/about_families_report_2_change.pdf).

<sup>753</sup> Wylie, K, (Morton Fraser website) “Adoption: The blend trend” (1 May 2014), available at <http://www.morton-fraser.com/knowledge-hub/adoptionthe-blend-trend>.

<sup>754</sup> Cook, E, “I love him, but not his kids” *The Guardian*, 10 March 2007, <https://www.theguardian.com/lifeandstyle/2007/mar/10/familyandrelationships.family1>.

<sup>755</sup> (Scot Law Com No 187, 2002) at para 2.10.

<sup>756</sup> *Ibid* at paras 2.37-2.38.

On the one hand the concept of step-parent is wide. It includes any person who is married to the biological or adoptive parent of the deceased. We have no difficulty in regarding a step-parent as a member of the deceased's immediate family when he or she has played a part in the upbringing of the deceased child. But that will not always be the case, particularly where the step-parent's marriage took place when the child was an adult. On the other hand, the concept is narrow, as the relationship is only constituted by marriage. In modern family structures, a person can often play a major role in a child's upbringing even although he or she does not marry the child's biological or adoptive parent.

In essence, the SLC is highlighting the difference between a first family/second family dynamic, as discussed in the previous chapter, and a traditional stepfamily dynamic where an actual "parental" relationship exists. Recognition of this difference led the SLC to recommend changing the test for non-patrimonial loss from one based on the existence of an affinitive relationship to one based on acceptance of the deceased as a child of the claimant's family.<sup>757</sup> As will be discussed below, this analysis, which creates a distinction between two broad categories of stepfamilies, may provide some assistance in reflecting steprelationships in inheritance law.

### 6.2.3 Stepfamilies and the 1964 Act

Given the prevailing social mores at the time the 1964 Act was enacted, it is perhaps unsurprising that no mention was made of the terms stepchild, step-parent or stepfamily. While "it has been common throughout history for children to ... be looked after by people other than their natural parents,"<sup>758</sup> at the time the legislation was enacted the nuclear family was both the norm and the ideal<sup>759</sup> and disregarding stepfamilies was unproblematic. Furthermore, at common law, ties of both consanguinity and affinity had to be present for a child to inherit from her parent and, as a stepchild could not fulfil the former requirement, there would have been little reason to consider the place of stepfamilies in the 1964 Act.

But this is no longer the case. The traditional marriage-based heterocentric family model is becoming atypical<sup>760</sup> and although "most people still think ...[such a

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<sup>757</sup> *Ibid* at para 2.41.

<sup>758</sup> Coote, A, Harman, H and Hewitt, H, "Changing family structures and family behaviour" in Eekelaar, J and Maclean, M (eds), *A Reader on Family Law* (Oxford University Press, 1994), 43.

<sup>759</sup> *Ibid*.

<sup>760</sup> *Ibid*.

model]... is (approximately) the best way for family life to be lived”<sup>761</sup> other models have made important legal and social strides in recent years. Legislators are aware that “a credible legal system must serve the needs of the whole population”<sup>762</sup> and so strive to reflect the changing face of the family in legislation. In terms of succession law, numerous changes have been implemented over the years to reflect new family models: illegitimacy is no longer a bar to inheritance;<sup>763</sup> adopted children now inherit from their adoptive parents;<sup>764</sup> cohabitants have some recourse on intestacy;<sup>765</sup> civil partners inherit on the same footing as married couples;<sup>766</sup> and marriage is no longer restricted to opposite sex couples.<sup>767</sup> However, despite growing support for stepchildren to be recognised by succession law,<sup>768</sup> the SLC ultimately recommended that no change be made to the status quo. The merits of the SLC’s arguments—and some carry considerable force—will be considered in Chapter 7, but attention must first be turned to the current statutory position.

At present, a stepchild cannot claim legal rights or inherit from a step-parent on intestacy (a step-parent of course remains free to provide for a stepchild in a will). This is not stated in the Act but is acknowledged as true by all authorities.<sup>769</sup> Section 2(1) of the 1964 Act provides that “where an intestate is survived by children, they shall have rights to the whole of the intestate estate” and there is unanimous agreement that the terms “children” and “issue” have never been construed to include stepchildren.<sup>770</sup> This thesis is in no way asserting that the term children *ought* to be construed to include stepchildren but it bears stressing that the term child is not immutable and has been construed—in an inheritance context—in different ways in recent history.

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<sup>761</sup> *Ibid.*

<sup>762</sup> Sutherland (2004) at para 69.

<sup>763</sup> The coming into force of s 22(5) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 meant that illegitimate children obtained full succession rights in the estate of both parents on the same basis as legitimate children (Meston (1989) at para 663).

<sup>764</sup> 1964 Act s 23.

<sup>765</sup> Under the current law, a surviving cohabitant does not have access to prior rights or legal rights; however, s 29 of the FLSA 2006 provides a degree of discretionary protection when the deceased dies intestate leaving a surviving cohabitant.

<sup>766</sup> 1964 Act s 2(1)(e) was amended by Sch 28 para 2(b) of the Civil Partnership Act 2004.

<sup>767</sup> Marriage and Civil Partnership (Scotland) Act 2014.

<sup>768</sup> 2009 Report at para 2.31.

<sup>769</sup> *Ibid.*

<sup>770</sup> Hiram (2007) at para 2.16.

There are two examples of the definition of the term “child” being adapted to reflect new social mores. The Adoption Act 1950, re-enacting a provision of the Adoption of Children (Scotland) Act 1930, provided that “the expressions ‘child’, ‘children’ and ‘issue’, where used in relation to any person in any disposition, shall not, unless the contrary intention appears, include a person or persons adopted by that person.”<sup>771</sup> However, this position became increasingly unacceptable and was consequently reversed by the 1964 Act which holds that “unless the contrary intention appears” in any deed “whereby property is conveyed or under which a succession arises” the child of the adopter shall be construed as, or as including, “a reference to the adopted person.”<sup>772</sup> Indeed, the 1964 Act states that an adopted person shall be treated as the child of the adopter “for all purposes”<sup>773</sup> relating to “the succession to a deceased person (whether testate or intestate).”<sup>774</sup>

The second example is that of illegitimate children. The common law “discriminated very harshly” against illegitimate children<sup>775</sup> and, prior to the enactment of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, an illegitimate child was considered “an utter stranger in blood” to both the mother and the father.<sup>776</sup> The 1968 Act reversed this position by providing that the marital status of a person’s parents had no role in establishing the legal relationship between the parent and child.<sup>777</sup> As with so many changes in family law, the amendment was the product of a shift in societal mores that had rendered the alienation of “illegitimate” children unacceptable. The last vestiges of illegitimacy in Scots law were removed by section 21 of the Family Law (Scotland) Act 2006, which amended the 1968 Act to categorically abolish the status of illegitimacy.<sup>778</sup>

Before illegitimate children and adopted children were granted full succession rights by statute, the common law did allow for them to inherit in certain circumstances and

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<sup>771</sup> Section 15(2), reproduced in *Hay v Duthie’s Trustees* 1956 SC 511 at 511.

<sup>772</sup> 1964 Act s 23(2).

<sup>773</sup> The 1964 Act does not apply to hereditary titles and coats of arms, which continue to devolve under the common law rules governing heritable succession (Hiram (2007) at para 4.1).

<sup>774</sup> 1964 Act s 23(1).

<sup>775</sup> Meston (1989) at para 663.

<sup>776</sup> *Clarke v Carfin Coal Co* (1891) 18 R (HL) 63 at 70 per Lord Watson (discussed in *ibid*).

<sup>777</sup> 1964 Act s 1(1).

<sup>778</sup> Illegitimacy is still relevant in the context of succession to titles and honours (Sutherland E, et al. (eds), *Law Making and the Scottish Parliament: The Early Years*, (Edinburgh University Press, 2014), 62.

the case law around this point is fascinating. In *Hay v Duthie's Trustees*,<sup>779</sup> for example, the court was asked to decide whether the pursuer, who had been adopted by the deceased, could be considered a child of the testator within the meaning of the language used by him in a trust disposition and settlement. From the vantage point of the present day, the certitude expressed in the court's response seems misplaced. Lord Migdale opined that "there is no dispute that the primary meaning of the word 'children' is natural legitimate children"<sup>780</sup> and, in support of this, he cited *M'Laren on Wills and Succession* which held that the word "children" was uniformly construed as applying solely to lawful children.<sup>781</sup> At advising Lord Sorn expressed a similar view:<sup>782</sup>

It has long been settled that the word, in its primary meaning, does not include illegitimate children, and my impression is that the word has so long been accepted as designating legitimate children, i.e. children of the body, that it would be held not to include children by adoption.

This raises two interesting, contradictory points: firstly, parenthood is rooted in biology; and, secondly, biology was not enough to counter the devastating effect of illegitimacy. This is particularly important, as there is a tendency to think that parenthood was traditionally about biology and is only now complicated by issues of assisted reproduction and complex families. Clearly, this was not the case.

This point aside, the case—and others like it—is particularly interesting in terms of the arguments that were advanced by counsel in support of the pursuer. At one stage, for example, counsel argued that "the circumstances showed that the testator always treated the pursuer as if she had been his natural child."<sup>783</sup> This emphasis on the relationship between the deceased and the pursuer was similar to the arguments advanced in favour of the *de facto* step-parent in *McGibbon*.<sup>784</sup> Aside from the obvious inconsistencies of treating an adopted child as a child of the adopter for all purposes other than succession, the law reformers must surely also have been motivated by a desire to change the potentially offensive message communicated by

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<sup>779</sup> 1956 SC 511.

<sup>780</sup> *Ibid* at 514.

<sup>781</sup> *Ibid* at 517.

<sup>782</sup> *Ibid* at 531.

<sup>783</sup> *Ibid* at 515.

<sup>784</sup> *McGibbon v McAllister* at para 12.

the then legislative framework. It is equally possible that the implication that stepchildren are “lesser” than biological or adoptive children could be construed as offensive by some and the demand for stepchildren to be recognised, in some limited circumstances, may grow in future years.<sup>785</sup> Certainly, existing evidence suggests that there is already public support for including stepchildren in intestacy statutes where a family relationship exists.<sup>786</sup>

### 6.3 What is a parent?

As has been shown, the legal and social definitions of the terms child and children have expanded over the years. As a corollary, so too have the legal and social definitions of “parent”. The terms are interrelated, insofar as the meaning of the word parent is anchored in its relationship to the term child and, to understand the relationship between the two, it is important to consider both parts of this symbiotic whole. This discussion is particularly important in the context of reconstituted families because the changing understanding of the term parent also informs our understanding of the term “step-parent.”

It was argued in Chapter 3 that the parent-child relationship was one of asymmetrical reciprocity,<sup>787</sup> and this is particularly evident in a discussion of inheritance. For the purposes of the law reform process, the primary question is not whether the step-parent should be entitled to inherit from the stepchild’s estate (although this question could arise) but whether the stepchild (and society) have a legitimate expectation that a stepchild will inherit from a step-parent’s estate, either upon intestacy or through legal rights in a testate estate. Crucially, this question must be viewed not just through the eyes of the stepchild, but also through the eyes of the step-parent. As has been repeatedly stated, expectation in regard to inheritance does not exist solely in the “grasping” beneficiary, but equally in the parent who wishes to cement the parent-child relationship at the end of her life. As such, it must also be asked whether it can

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<sup>785</sup> This is not to suggest that all – or even the majority of – people will consider stepchildren to be equal to children in all – or even the majority of – circumstances. However, as stepfamilies become increasingly common there may be an expectation that some recourse be provided for stepchildren in certain circumstances. Indeed, the fact that the *Burial and Cremation (Scotland) Act 2016* treats the stepchild of an adult as the child of the adult for the purposes of making arrangements for the adult’s remains to be buried or cremated suggests that lawmakers are increasingly cognisant that stepchildren can today hold an important place in a stepparent’s life.

<sup>786</sup> See, for example, NatCen (2010) p. 59.

<sup>787</sup> Chapter 3, 3.5.2.

be assumed that step-parents would want their children both to inherit on intestacy and to be able to claim legal rights on a testate estate. In other words, is being a step-parent the equivalent to being a parent for inheritance purposes?

### 6.3.1 The historical definition

To answer the question, attention must first be turned to what is meant by the term “parent;” this, however, is no easy task. Any attempt to answer this ostensibly simple question becomes quickly mired in complexity as it becomes evident that “there is no consensus on either what parents are or what they should be.”<sup>788</sup> In times gone by, the answer was intimately linked to marriage: in a period when scientific knowledge did not allow for genetic paternity testing the (still relevant) presumption, *pater est quem nuptiae demonstrant*, reigned supreme.<sup>789</sup> However, parenthood was not linked to marriage simply because the husband, by dint of “access”<sup>790</sup> to his wife, was the most likely father, but because marriage conferred legitimacy on the child. The relationship between the parent and the child was in a sense secondary to the relationship between the parents: if the parental relationship was not in the designated legal form, then the relationship between parent and child was not legally recognised.

This is not to say that the biological tie had no importance. Although legitimacy was the ultimate trump card, it was assumed that what was being legitimised was a biological relationship. In other words, the presumption implicitly operated to establish biological paternity, although an element of doubt could always be present. In the case of maternity, although establishing biological parenthood was rarely an issue,<sup>791</sup> legal maternity also depended on marriage since, as aforementioned, an illegitimate child was “an utter stranger in blood” to both the mother and the father.<sup>792</sup>

In terms of a historical definition of parenthood, a final point to note is that, while families have always looked after other people’s children, statutory adoption is a

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<sup>788</sup> Sclater, SD, Bainham, A, and Richards, M, “Introduction” in Bainham, A, Richards, M, and Sclater, SD (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999), 1.

<sup>789</sup> Wilkinson and Norrie (2013) at para 3.06.

<sup>790</sup> The term employed by Lord Gifford in *Gardner v Gardner* (1876) 3 R 695 at 723, discussed also in *ibid*.

<sup>791</sup> Wilkinson and Norrie (2013) at 3.05.

<sup>792</sup> *Clarke v Carfin Coal Co* (1891) 18 R (HL) 63 at 70 per Lord Watson (discussed in Meston (1989) at para 663).

product of the twentieth century, there having been no formal recognition of such a process until 1926 in England and 1930 in Scotland.<sup>793</sup> In other words, parenthood was historically extremely tightly circumscribed, confined to a biological tie legitimised by marriage.

### 6.3.2 A contemporary definition

While a definitive modern definition of “parent” may prove elusive, it can be agreed that the term has evolved significantly and is likely to continue to do so. Advances in medical science, coupled with shifting social values, mean that courts and legislators are now confronted with a range of possible answers when they ask who—and indeed what—is a parent. In the remainder of this section, an attempt will be made to provide a taxonomy of the term “parent,” a hotly contested and highly politicised designation. In this endeavour, the starting point will be the authoritative classification provided by Baroness Hale in *Re G*,<sup>794</sup> a definition that has since been reproduced in textbooks and judicial decisions alike,<sup>795</sup> although not always without criticism. In her definition, Baroness Hale identified three types of parenthood: genetic parenthood; gestational parenthood; and, social and psychological parenthood. These will be considered in turn.

#### 6.3.2.1 Genetic parenthood

Baroness Hale described genetic parenthood as “the provision of the gametes which produce the child,”<sup>796</sup> a definition which appears unassailable. Although genetic parenthood is presented by Baroness Hale as a *category* of natural parenthood, it is used by others as a *synonym* for natural parenthood. Similarly, it is often—but not entirely accurately—used interchangeably with “biological” parenthood by judges and legal commentators.<sup>797</sup> The ideology behind equating biological and genetic parenthood with “natural” parenthood will not be explored in any detail, but the fact remains that, for some, biology is the defining feature of parenthood. Indeed, despite

<sup>793</sup> Ross, M, “Adoption in the 21st century: still image against a moving picture?” in Scoular, J (ed), *Family Dynamics: Contemporary Issues in Family Law* (Butterworths Lexis Nexis, 2011), 111.

<sup>794</sup> *Re G* [2006] UKHL 43.

<sup>795</sup> See, for example, Wilkinson and Norrie (2013) at para 3.02.

<sup>796</sup> *Ibid.*

<sup>797</sup> Bainham, A, “Parentage, parenthood and parental responsibility: subtle, elusive yet important distinctions,” in Bainham, A, Richards, M, and Sclater, SD (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999), 26. Bainham argues that genetic parenthood, like gestational parenthood, is a category of biological parenthood.

progress in destigmatising alternative forms of parenthood, the biological link is rarely entirely displaced. For example, in *Re G*, Lord Nicholls of Birkenhead observed that “in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child’s best interests.”<sup>798</sup>

At first blush, it is tempting to dismiss Lord Nicholls’ comments as typical of a reactionary judiciary, out of touch with contemporary social mores. Yet in light of the emerging consensus around the importance of knowing one’s genetic origins (see discussion below at 6.3.3) his comments are not entirely misplaced, particularly when read in context. Unfortunately, however, when read in isolation, there is an easily reached inference that the biological parent is always to be preferred. Ultimately, the difficulty lies in the need to acknowledge the general or common experience, while simultaneously resisting the facile assertion that its prevalence stems from some ill-defined but inherent superiority. Many children will be raised by at least one biological parent but any suggestion that this norm is “natural”—and the concomitant implication that alternatives are “unnatural”—is offensive to those who do not conform to this model. Unfortunately, however, the temptation to establish a hierarchy with a view to establishing “who has the most legitimate claim to the title of ‘parent’”<sup>799</sup> is one that many fail to avoid.

### 6.3.2.2 Gestational parenthood

The second type of parenthood Baroness Hale identified was gestational parenthood, defined as “the conceiving and bearing of the child.”<sup>800</sup> This aspect of her taxonomy has been criticised,<sup>801</sup> perhaps with particular reference to the statement that carrying a child creates, in most cases, “a relationship which is different from any other.”<sup>802</sup> However, such criticism may be unwarranted. After all, surrogacy laws currently designate the gestational mother, not the genetic mother, as the legal mother,<sup>803</sup> suggesting a recognition of the bond created through this experience. Furthermore,

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<sup>798</sup> *Re G* at para 2.

<sup>799</sup> Sclater (1999), 1.

<sup>800</sup> *Re G* at para 34.

<sup>801</sup> See for example Harris-Short, S, Miles, J and George, R, *Family Law: Text, Cases and Materials* (Oxford University Press, 2014), 601.

<sup>802</sup> *Re G* at para 34

<sup>803</sup> Section 33 (1) of the Human Fertilisation and Embryology Act 2008 (HFEA) provides that the surrogate mother will be regarded as the child’s legal mother.

she spoke only of the vast *majority* of cases, not of a universal truth, although by striving to reflect common experience she inevitably risked alienating those whose experience deviates from this norm.

### 6.3.2.3 Social parenthood

Thus far, the definitions of natural parenthood discussed have been unsurprising: few would contest genetic or gestational parents being termed “natural” parents. Indeed, many understand the terms genetic, gestational and natural (along with biological) as interchangeable. However, although science now allows us to establish a child’s genetic parents with certainty, “the legal status of parent is no longer necessarily established by proving a genetic parental link between persons.”<sup>804</sup> For example, a court-issued adoption order establishes a parent-child relationship in law<sup>805</sup> between parties with no genetic link. In a similar vein, section 35(1) of the Human Fertilisation and Embryology Act provides that, where a woman becomes pregnant following “the placing in her of an embryo” at a time that she was “a party to a marriage,” the other party to the marriage shall (if the embryo was created with sperm that was not his) “be treated as the father of the child” unless it is shown he did not consent to the process.<sup>806</sup> Thus, Norrie concludes, “society no longer sees parenthood solely in terms of the genetic connection, and neither does the law.”<sup>807</sup> This is an important and positive step and reflects the experience of many families.

Social parents who have become parents through adoption or assisted reproductive technology (ART) are indisputably also legal parents, being designated as such by statute, and, in such circumstances the inclusion of social parenthood as a category of natural parenthood is entirely understandable. As the term “natural” is so prized, placing parents who have become parents through ART or adoption beyond the term’s semantic reach could seem inappropriate, implying as it might that they are somehow lesser parents. However, the decision to classify social parents *in general* under the heading of “natural” parents is somewhat more surprising.

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<sup>804</sup> Wilkinson and Norrie (2013) at para 3.02.

<sup>805</sup> Adoption and Children Act 2002 s 67(1).

<sup>806</sup> HFEA s 35(1)(a)(b).

<sup>807</sup> Wilkinson and Norrie (2013) at para 3.02.

Baroness Hale defined social parenthood as follows:<sup>808</sup>

The relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting. The phrase "psychological parent" gained most currency in the influential work of Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* (1973), who defined it thus: A psychological parent is one who, on a continuous, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfils the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological, adoptive, foster or common law parent.

The difficulty of including social parenthood as a category of natural parenthood lies in the very broad definition Goldstein et al. provide. They maintained that a psychological parent may be a biological, adoptive, foster or common law parent and, in today's context, "step-parent" could equally be added to the list. However, it is not immediately clear that society has the same expectations of a step-parent (or foster parent) as it does of a biological or adoptive parent.

The Scottish Social Attitudes Survey 2004 provided some insight into this question. While most participants thought that step-parents should "exercise some degree of financial responsibility for the stepchildren with whom they lived ... nearly three quarters of respondents thought that a step-father should *not* be expected to continue beyond separation to provide financial support for a stepchild."<sup>809</sup> The law, however, does not necessarily agree and if a step-parent has accepted a child as a "child of the family," the Family Law (Scotland) Act 1985 confers on her the same liability to aliment the child as a biological parent.<sup>810</sup>

In this survey, despite the participants' reluctance to see erstwhile step-parents burdened with the obligation of aliment, over three-quarters of the respondents expressed the view that a stepfather should have the same rights to contact as a

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<sup>808</sup> *Re G* at para 35.

<sup>809</sup> Scottish Government (2005) at 4.6.

<sup>810</sup> FLSA 1985 s 1(1).

“natural” father.<sup>811</sup> Thus, the researchers concluded that the data formed a “mixed picture about what public opinion is about the obligations a step-parent should assume, or that society more widely should expect of them.”<sup>812</sup> Nevertheless, while the data undoubtedly revealed conflicting views, opinions on aliment suggest that, at least for some, a step-parent stops being a step-parent when the relationship between the “natural” parent and the step-parent breaks down. Thus, it could be argued that step-parenthood does not contain the same “no exit” obligation that has been held to exist in the conventional parent-child relationship.<sup>813</sup> This is one of the reasons that categorising all social parents as natural parents risks being over-inclusive.

This question assumes particular importance in an inheritance context: if stepchildren were given some claim on a step-parent’s estate, would that claim be dependent on the step-parent dying while still in a relationship with the child’s “natural” or legal parent? Equally important is the question of when a step-parent becomes a parent: biological/gestational parents are widely regarded as becoming parents the moment the child is born and the legal status of parenthood most often follows;<sup>814</sup> similarly, adoptive parents become parents at the moment the adoption order is granted. However, as will be discussed below, the process of becoming a step-parent is different. While the legal status of step-parent may follow marriage, the social process is far less clearly delineated and subject to negotiation between the step-parent and stepchild. This is particularly problematic in the context of the “absolutist”<sup>815</sup> tradition of succession law.

#### **6.3.2.4 Legal parenthood**

Baroness Hale began her analysis of natural parenthood by asserting that it was distinct from legal parenthood. Unfortunately her judgment contained no exposition of legal parenthood, a term that often gives rise to confusion. To add to the complexity, contemporary family law is more concerned with parental rights and

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<sup>811</sup> Note that the researchers used natural as a synonym for biological/gestational/adoptive parent, and included step-parent as a distinct category.

<sup>812</sup> Scottish Government (2005) at para 4.8.

<sup>813</sup> Chapter 4, p.132

<sup>814</sup> Exceptions include, for example, HFEA s 48(2) which provides that sperm donors are not held to be the father of any child born as a result of their sperm being used.

<sup>815</sup> Norrie (2008) at 79.

responsibilities (the power to *act* as a parent),<sup>816</sup> than it is with categorising parents as legal, natural or both. Furthermore, while many parents will be both legal and natural parents, and hold the full suite of parental rights and responsibilities, it bears repeating that this is not always the case.<sup>817</sup> Equally, a person who is neither a natural parent nor a legal parent, such as a grandparent, can hold parental responsibilities and rights.

In many instances, however, the legal parent will also be the genetic parent. In the English context, Bainham states that “the establishment of genetic parentage will generally result in the attribution of legal parenthood”<sup>818</sup> and the same is true of Scotland.<sup>819</sup> Nevertheless, while genetic parenthood, in most instances, establishes legal parenthood, it does not always trigger the full complement of parental responsibilities and rights. However, crucially, it does trigger both the obligation to aliment the child and the right of succession.<sup>820</sup> In other words, even if a parent has no parental rights or responsibilities, as long as her genetic parenthood has not been transferred to a second legal parent (as in the case of adoption or surrogacy), she remains the legal parent and succession rights ensue.

Legal parenthood thus carries an important symbolic weight. While genetic, gestational, adoptive parents and parents under the terms of the Human Fertilisation and Embryology Act can all lose their parental rights and responsibilities, their legal parenthood is inalienable<sup>821</sup> and this is perhaps why it is described as “the most fundamental relationship between parent and child.”<sup>822</sup> Legal parenthood is a “permanent, non-alienable” relationship which “has legal consequences for the individual through life, not just during childhood.”<sup>823</sup> When legal parents lose parental rights and responsibilities, they remain legal parents; in contrast, when social parents lose parental rights and responsibilities they are left with no status. Furthermore, whereas legal parenthood can currently be held by only two individuals at any one time, parental responsibility can be “conferred on a succession of different social

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<sup>816</sup> See generally discussion in Mair (2008) and Wilkinson and Norrie (2013) at para 3.02.

<sup>817</sup> For the avoidance of doubt, neither natural parenthood nor legal parenthood guarantees that the parent will hold parental rights and responsibilities.

<sup>818</sup> Bainham (1999), 32.

<sup>819</sup> See generally Wilkinson and Norrie (2013) Ch 3.

<sup>820</sup> *Ibid* at para 3.08.

<sup>821</sup> Unless the child is given up for adoption.

<sup>822</sup> Harris-Short et al. (2014), 601.

<sup>823</sup> *Ibid*, 602.

carers.”<sup>824</sup> Finally—and importantly in the context of succession law—legal parenthood, not parental responsibility, “makes the child a member of a family, generating for that child a legal relationship with wider kin going well beyond the parental relationship.”<sup>825</sup>

The traditional link between legal parenthood and succession law thus militates against granting stepchildren succession rights. Furthermore, while some commentators advocate in favour of greater parental rights and responsibilities for step-parents in some circumstances, not all are convinced that the wider status of legal parenthood should be conferred upon them.<sup>826</sup> However, while an automatic entitlement would seem difficult to justify, this does not necessarily preclude a discretionary entitlement where the step-parent is also an “accepting” parent.<sup>827</sup>

### 6.3.2.5 *Intentional parenthood*

A final type of parenthood, and one that was not considered by Baroness Hale, is intentional parenthood. Intentional parenthood is a term that is gaining currency,<sup>828</sup> although its origins reach back several decades: for example, the importance of intention has been recognised “in the process of adoption and more recently in the use of donated gametes in assisted conception techniques.”<sup>829</sup> However, while intent undoubtedly has its place in these circumstances, Douglas has cautioned against using it as the main criterion for legal parenthood:<sup>830</sup>

Basing parenthood on intention implies a preparedness to recognise the free alienability of parental responsibility and hence the acceptability of surrogacy agreements. It comes closer to characterising children more openly as a form of property which can be transferred to others.

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<sup>824</sup> *Ibid*, 601.

<sup>825</sup> Bainham (1999), 33.

<sup>826</sup> *Ibid*, 43.

<sup>827</sup> For further discussion see Chapter 7, 7.5.1.

<sup>828</sup> See discussion at Chapter 7, 7.6. In a recent (unreported) Canadian case a woman who was not in a conjugal relationship with a child’s biological mother was granted a declaration of parentage so that her name now appears on the child’s birth certificate as his other parent. (Taylor-Sussex, P, “Co-Mommas: a historic declaration of parentage”, 23 Feb 2017, available at <https://nelligan.ca/blog/family-law/co-mommas-historic-declaration-parentage/>).

<sup>829</sup> Callus, T, “First designer babies, now a la carte parents” (2008) 38 *Family Law* 143 at 143.

<sup>830</sup> Douglas, G, “The intention to be a parent and the making of mothers” (1994b) 57 *Modern Law Review* 636 at 640.

The term has particular importance in the context of surrogacy, but also overlaps with society's conceptualisation of some forms of social parenthood. While it is not self-evident that all parents who intentionally assume the role of a social parent also wish to assume full legal parenthood, intent nevertheless plays a central role in defining the extent of the parental relationship that exists between a step-parent and a stepchild. Parental intent will be discussed further in Chapter 7, in relation to both three-parent families and the accepted child model.

### 6.3.3 Parenthood and the biological trump card

Ironically, now that biological or genetic paternity can be readily established, there is a move away from biology as the bedrock of parenthood. However, this new context, in which intentional and social parenthood enjoy enhanced status, exists in tension with a drive for “genetic truth.”<sup>831</sup> This can be seen, for example, in the move towards open adoptions<sup>832</sup> and the loss of anonymity for sperm donors.<sup>833</sup> Furthermore, while Baroness Hale placed social parenthood on an equal footing with biological parenthood in *Re G*, a closer reading suggests that biological parenthood retains particular importance: biology is, as Norrie has observed, “a trump card.”<sup>834</sup> The position remains that “it is neither a presumption nor a principle that children are best left with their biological parent, but is ... recognition of a widely held belief based on practical experience and the workings of nature.”<sup>835</sup>

The biological trump card also applies in relation to succession law. The Succession (Scotland) 1964 Act applies only to legal parents, the majority of whom are also genetic/biological parents. On the one hand, this restriction is perhaps entirely appropriate. Prior to her judgment in *Re G*, Baroness Hale argued that the step-relation is not the same as the “normal” family constituted within marriage and “perhaps we should not pretend that it is.”<sup>836</sup> On the other hand, some step-parents will have full parental rights and responsibilities and so their reality closely mirrors

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<sup>831</sup> Bainham (1999), 42.

<sup>832</sup> Ross (2001), 119.

<sup>833</sup> The Human Fertilisation and Embryology Authority (Disclosure of Donor Information Regulations 2004), Regulation 2.

<sup>834</sup> Norrie, K, “Lesbian families, parenthood and contact” (2006) 51 *Journal of the Law Society of Scotland* 24.

<sup>835</sup> *Ibid.*

<sup>836</sup> Hoggett BM in Hoggett, BM and Pearl, D, *Family, Law and Society: Cases and Materials*, (2<sup>nd</sup> edition, Butterworths, 1987), 126 reproduced in Bainham (1999), 43.

that of many legal parents. Indeed, one of the few factors that distinguishes them from legal parents is that their stepchildren, unlike their legal children, will not succeed to their estate. The question of how different commentators propose accommodating this reality in contemporary succession law will be considered in Chapter 7.

#### 6.4 The 2005 Survey

The Scottish Law Commission included two questions on stepchildren in the 2005 Survey. The first question related to intestate succession and involved a man who had been married twice dying intestate, survived by two stepchildren whom he had accepted as children of his family. Participants were asked to what extent his stepchildren should be entitled to receive something from his estate. The participants were next told to imagine that the deceased also had children from his first marriage, and then asked whether his stepchildren should be treated in exactly the same way as his biological children for the purposes of sharing his estate. 75% of participants felt that his stepchildren should be entitled to receive something from his estate, while 68% felt that the man's stepchildren should be treated in exactly the same way as his own children for the purposes of sharing the estate.<sup>837</sup>

The participants were next asked to consider stepfamilies in the context of testate succession. Here they were told that a woman who had been married twice died, leaving two young stepchildren whom she had accepted as children of her family. The woman had left her entire estate to charity and the participants were asked whether the stepchildren should be entitled to claim on her estate. Mirroring the pattern in the previous question, they were then told that the woman also had children from her first marriage and were asked whether they agreed that the stepchildren should be treated in exactly the same way as her own children for the purpose of sharing her estate. Here 65% of participants felt that young children should be entitled to something and 66% felt that her children and stepchildren should be treated as equals.<sup>838</sup>

Overall, the SLC found “considerable public support” for granting stepchildren “rights in respect of their step-parent or acceptor’s intestate estate.”<sup>839</sup> However, the

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<sup>837</sup> 2005 Survey at paras 2.11-2.13.

<sup>838</sup> *Ibid* at paras 2.24 -2.26.

<sup>839</sup> 2009 Report at para 2.31.

SLC was concerned that the participants had a very particular view of the stepfamily in mind when they answered the question, one where a young widow remarries and the stepfather becomes the father.<sup>840</sup> In other words, a situation where the step-parent *replaces* the parent, rather than co-existing with him or her. There is little doubt that such scenarios do occur but they are not the predominant experience and Bainham has argued that it is important to distinguish between different scenarios:<sup>841</sup>

The SLC is right to express caution about the findings generated by the question, as it is not clear that they can be extrapolated and applied to other stepfamily models. Unfortunately, however, the question provided no insight into how the public view alternative stepfamily models. This is in many ways unsurprising as stepfamilies were not a stated focus of the Report.<sup>842</sup> Nevertheless, as stepfamilies are an important feature of the “new” Scottish family landscape, this important topic deserves further attention. It was with this in mind that a question on stepfamilies was included in my research project. The findings of this research question will be considered in Chapter 7.

## 6.5 Other family relationships

As aforementioned, reconstituted families do not create only a new parent/child relationship but, in many cases, also engender new sibling relationships. This section will focus on the inheritance rights of siblings on intestacy.

Sibling relationships fall into three categories: full siblings; half-siblings and stepsiblings. Half-sibling relationships merit analysis since the SLC reform proposals seek to change the inheritance entitlements of half-siblings by aligning them with those of full siblings.<sup>843</sup> This raises questions both as to which obligations and entitlements exist between full siblings in an inheritance context and whether these obligations and entitlements are the same as those that operate between half-siblings (and indeed stepsiblings).

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<sup>840</sup> DP 136 at 2.73.

<sup>841</sup> Bainham (1999), 44.

<sup>842</sup> 2009 Report at para 1.2.

<sup>843</sup> 2009 Report at para 2.37.

Half-siblings are traditionally defined as children who share one biological parent,<sup>844</sup> often as a result of relationship infidelity (as was the case with Alec in Group 7)<sup>845</sup> or of parental re-partnering (as was the case with Chris in Group 10).<sup>846</sup> However, the reference to a shared *biological* parent is unhelpful, as it can be both over-inclusive and under-inclusive. For example, if both partners in a female same-sex couple had a child using the same sperm donor those children would be half-siblings biologically, although they would be full siblings functionally.<sup>847</sup> Similarly, if a man had an adopted child from a previous union and then fathered a child in a subsequent relationship, the children would functionally (and legally)<sup>848</sup> be half-siblings, although they would not share a biological parent.<sup>849</sup> However, while the definition of the term “half-sibling” merits further consideration, participants in the study appeared to limit their consideration to half-siblings who were biologically related.

Half-sibling relationships commonly, although not exclusively, arise in stepfamilies. Studies suggest that a mutual child is believed to “cement” a stepfamily<sup>850</sup> and it might therefore be expected that the number of half-sibling relationships would rise in

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<sup>844</sup> See for example, Tach, L, Edin, K, McLanahan, S, *Multiple Partners and Multiple Partner Fertility in Fragile Families*, *Fragile Families Working Paper* WP11-10-FF (2011), available at <http://cfcw.princeton.edu/workingpapers/WP11-10-FF.pdf>. Where a reference is not made to a biological tie with the shared parent, it is often made to the biological tie with the half-sibling, which amounts to the same thing: s 2(2) of the 1964 Act, for example, refers to whole blood versus half blood siblings.

<sup>845</sup> Tom had a son from an extra-marital relationship, as well as two children from his marriage.

<sup>846</sup> Chris had two half-siblings from his father’s second marriage.

<sup>847</sup> This point was addressed in *Case L* ((Human Fertilisation and Embryology Act 2008) [2016] EWHC 2266 (Fam), where a female same-sex couple (X and Y) each gave birth to a child using the same sperm donor. C1 was born before HFEA came into force and, consequently, only Y, the gestational mother, could be registered as C1’s parent. X subsequently gave birth to C2 after HFEA came into force and it was intended that both would be legal parents. However, due to an error, Y did not become the legal parent of C2 and, when the couple split up, they agreed that neither would be the legal parent of the other’s biological child. As such, X sought a declaration of parentage that Y was not the legal parent of C2. In his discussion of the facts, the President of the Family Division stated, “it will be appreciated that C1 and C2 are half-siblings.” While this is biologically and legally correct, it does not reflect the intention of X and Y that the children be raised as full siblings. This echoes the Chapter 6 discussion of intent as a factor used to establish family relationships (6.3.2.5).

<sup>848</sup> The current law regarding adopted children and their siblings is clear. Section 24(1) of the 1964 Act provides that an adopted person shall be deemed to be related to any other person being the child or the adopted child of the adopter as a brother or sister of the whole blood where he or she was adopted by two spouses jointly and that other person is the child or adopted child of both of them and, as a brother or sister of the half blood in any other case. In the example given above, the siblings would be half-siblings in the eyes of the law although they do not share a biological parent.

<sup>849</sup> The Law Commission of England and Wales expressed its preference for the terms full siblings and half-siblings, perhaps recognising the difficulties of over-emphasising the biological tie (2011 Report, Glossary).

<sup>850</sup> See for example, discussion in Juby et al. (2001), 13, or Ganong, L, and Coleman, M, *Stepfamily Relationships: Development, Dynamics, and Interventions*, (2<sup>nd</sup> edition, Springer, 2017), 97.

line with the number of stepfamily relationships.<sup>851</sup> A number of commentators assert that half-sibling relationships are increasingly common; however, due to a dearth of data, concrete figures remain elusive.<sup>852</sup> It should be noted that the lack of available data on half-siblings is closely related to lack of information on stepfamilies: more detailed information on stepfamily composition would likely, indirectly, also generate more information on half-sibling relationships.

It would not be impossible to gather such data. In Canada, for example, the national statistics agency, Statistics Canada, analysed census data and identified two kinds of stepfamilies: simple and complex. A simple stepfamily is narrowly defined as one where only one spouse has children who were born or adopted before the current union.<sup>853</sup> A complex stepfamily can arise in two circumstances: firstly, the term is used in relation to stepfamilies where both spouses have children from a previous union living in the household; and, secondly, it is used when at least one parent has children from a previous union and there are also children born into the new union.<sup>854</sup>

It is this second circumstance that gives rise to half-sibling relationships and, at least in Canada, such relationships appear to be on the rise. Statistics Canada found that while the proportion of parents living in a stepfamily has remained fairly stable, the proportion of parents in simple stepfamilies has declined while the proportion of those in complex families has grown.<sup>855</sup> Furthermore, the growth in the proportion of parents in complex stepfamilies was found to be primarily attributable to an increase in the number of parents in those families who have had children together.<sup>856</sup> In 2001, 34% of all parents in stepfamilies had one or more children together; in 2011, the proportion was 43%.<sup>857</sup> These figures do not include stepfamilies where the children

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<sup>851</sup> Some commentators reserve the term “blended” family to apply specifically to stepfamilies with a common child (see, for example, Juby et al. (2001)). This usage of the term is not universal.

<sup>852</sup> See for example, Tanskanen, A et al., “Sibling conflicts in full- and half-sibling households in the UK” (2017) 49 *Journal of Biosocial Science* 31 at 32.

<sup>853</sup> Vézina, M, *2011 General Social Survey: Overview of Families in Canada – Being a parent in a stepfamily: A profile* (Statistics Canada, 2012), 6, available at <http://www.statcan.gc.ca/pub/89-650-x/89-650-x2012002-eng.pdf>.

<sup>854</sup> *Ibid.*

<sup>855</sup> *Ibid.*, 9

<sup>856</sup> *Ibid.*, 10.

<sup>857</sup> *Ibid.*

from the previous union do not live with the couple and do not, therefore, reflect the half-sibling relationships that arise in the first family/second family context.

While caution must be exercised in applying data from another jurisdiction to the Scottish context, there appears to be a consensus that this trend is matched both in Scotland<sup>858</sup> and in the US.<sup>859</sup> Certainly, half-siblings are often considered to be a feature of “modern” families and, as the SLC is rightly interested in contemporary families, it is unsurprising that it chose to review this area of the law. Of course, as with stepfamilies, identifying commonality of experience and expectation amongst half-siblings can be fraught with difficulty. In some instances, half-siblings will have little or no contact, and may not even know of each other’s existence. Equally, however, others may enjoy a close relationship and may have been raised in the same household for at least some of their childhood. Finally, if the half-sibling is born as a result of the mother’s extra-marital relationship, the half-siblings may even believe they are full siblings. Great diversity can exist in relationships between full siblings as well; nonetheless, studies suggest that “people...tend to feel closer to, and have more contact with, their full-siblings ... compared with their half-siblings”.<sup>860</sup> Certainly, as will be shown in the next chapter, the research findings from this project suggested that full siblings enjoy a status-based entitlement to inherit from their deceased sibling’s estate that half-siblings do not.<sup>861</sup>

### 6.5.1 The current law and the existing research

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<sup>858</sup> Although the SLC did not substantiate its assertion, it stated that reconstituted families are on the rise and, given that this comment was made in a paragraph on half-siblings, it might be thought that the reconstituted families at issue included half-siblings (2009 Report at para 2.37).

<sup>859</sup> Multiple-partner fertility (the name used to designate the demographic trend of adults having children with more than one partner) scholarship in the US often focuses on issues relating to child poverty and development; however, it also indirectly provides insight into the prevalence of half-sibling relationships. A 2011 study, for example, found that, by age ten, 60% of first born children of unmarried mothers have a half-sibling, while the researchers noted that other studies had found that multiple-partner fertility “is not rare” amongst married partners either (Cancian, M, Meyer, D, Cook, S, “Stepparents and half-siblings: a child’s perspective” (2011) 11 *Fast Focus* 1 at 2, available at <https://www.irp.wisc.edu/publications/fastfocus/pdfs/FF11-2011.pdf>).

<sup>860</sup> Tanskanen et al. (2017) at 32 (discussing and summarising several sibling studies).

<sup>861</sup> This point also emerged clearly in both the SLC 1986 Survey (see 7.2 below) and in the NatCen’s findings: while some people in both surveys felt that siblings should inherit everything, nobody in the Scottish survey argued that the half-sibling should inherit everything, while only 1% of respondents in the NatCen survey argued the half-sibling should be given priority (NatCen study (2010), 65).

Section 2(1)(c) of the 1964 Act provides that where no descendants survive the intestate siblings take one half of the estate between them while parents take the other half.<sup>862</sup> If the deceased has no surviving children or parents, siblings inherit the entire estate.<sup>863</sup> In its current form, intestacy law distinguishes between full and half-siblings. While section 2(2) states that “references in the foregoing subsection to brothers or sisters include respectively brothers and sisters of the half blood as well as of the whole blood,”<sup>864</sup> this is qualified by stating that “the collaterals of the whole blood shall be entitled to succeed thereto in preference to the collaterals of the half blood.”<sup>865</sup>

In its 1990 Report, the SLC recommended that the current rule be changed to allow collaterals of the half-blood to inherit equally on intestacy with collaterals of the full-blood,<sup>866</sup> and this view is reiterated in the 2009 Report.<sup>867</sup> The SLC cited two reasons for maintaining its 1990 recommendation: firstly, it argued that there is now an “even greater prevalence of reconstituted families;” and, secondly, it stated that there “continues to be unanimous support for this recommendation among our respondents.”<sup>868</sup> The first of these two reasons has been examined above but the second merits further consideration as, without doubting the integrity of the SLC’s assertion, it is not immediately clear from the 2009 Report *who* these respondents are or the grounds for their support.

The first point to note is that the respondents referred to were not participants in an attitudinal study but rather consultees who submitted written comments on the 2007 Discussion Paper. A cursory glance at the list of consultees suggests that the large majority were legal professionals.<sup>869</sup> While expert opinion is often both valuable and necessary, it is not immediately clear that the consultees’ specific professional expertise qualified them to evaluate the similarities between different types of sibling

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<sup>862</sup> While siblings (and parents) rank above the spouse in the order of succession, the spouse receives prior rights and legal rights before the intestate estate is distributed. Under the proposed reforms, where the deceased has no children, the spouse will receive the entire estate.

<sup>863</sup> 1964 Act s 2(1)(c).

<sup>864</sup> *Ibid*, s 2(2).

<sup>865</sup> *Ibid*, s 3.

<sup>866</sup> 1990 Report at para 2.23.

<sup>867</sup> 2009 Report at para 2.37.

<sup>868</sup> *Ibid*.

<sup>869</sup> 2009 Report, App B.

relationship. Wider public consultation might have provided a desirable complement to the consultative work. By contrast, the consultees who contributed to the English succession law reform process were of the view that “particular weight should be put on public opinion” on the question of half-siblings.<sup>870</sup>

This observation is secondary to another criticism, namely that the consultees were not actually called upon to engage fully with the question of half-siblings. Instead, they were simply asked to express their view on a previously formulated recommendation based on the findings of a study conducted in 1986, some 21 years previously.<sup>871</sup> No analysis was provided of the study and no consideration appears to have been given to whether the attitudes purportedly underpinning the recommendation would have changed between 1986 and 2009. Furthermore, the recommendation was not even presented to the consultees as a stand-alone consideration, but alongside five other recommendations from the 1990 Report that the SLC believed “should stand.” Consultees were asked whether they agreed with the list of recommendations as a whole and,<sup>872</sup> although respondents were obviously free to disagree with any or all of the six recommendations, this does not seem a particularly robust way to develop policy on such a nuanced issue.

In the 1986 survey, participants were asked who should benefit from the estate of an unmarried man, survived by a sister and a half-sister. Although the results revealed that the sister was thought to have a stronger claim than the half-sister, with 39% stating that the estate should go entirely (15%) or mainly (24%) to his sister, the majority (58%) supported equal division between the two. It is this finding that appears to form the basis of the SLC’s 2009 recommendation. Interestingly, whereas the SLC showed sensitivity to the shortcomings of its question on stepchildren’s entitlement, positing that participants were imagining a very specific type of stepfamily, it appears not to have considered the same nuances with regard to half-siblings.<sup>873</sup>

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<sup>870</sup> LC 2011 Report at para 3.23.

<sup>871</sup> 1986 Survey.

<sup>872</sup> DP136 at para 2.87.

<sup>873</sup> In its 1990 Report, the SLC merely observed that “it is impossible to generalise about the family situation of half brothers and sisters” before concluding, for unspecified reasons, that “to exclude them ... where there has been a close family relationship with the deceased is ... likely to give rise to a greater feeling of injustice than to include them ... where there has not been a close family

This oversight is unfortunate and further contributes to the sense that the question was not adequately explored. While it might be expected that half-siblings who have grown up together would have a strong bond, it is not clear that the same bond would exist if the children had never met, or if the children of the first family resented the parent re-partnering. In this sense, the heterogeneity of the half-sibling relationship appears comparable to that of the step-parent/stepchild relationship previously discussed.<sup>874</sup> there may be a relationship equivalent to a “nuclear family” relationship but, equally, there may be no relationship at all.

As this diversity in sibling relationships was not considered, and as the reasons underpinning participants’ attitudes in the 1986 study were not explored, it seems premature to have issued a recommendation to change the existing law. Such criticism is not to suggest that the SLC must be wrong in its conclusion; there may well be demand for the proposed reform, but the evidence presented does not convincingly make this case and more exhaustive reflection would have been desirable. Prompted by the inadequacy of the SLC’s consideration of the half-sibling relationship – and a desire to better understand how people experience this relationship in today’s society – a decision was made to include a question on half-siblings in my research study.<sup>875</sup>

The next chapter will address the findings of my research questions on stepfamilies and half-siblings. In addition, it will give consideration to the models that other jurisdictions have considered in relation to these questions in order to further explore the ways in which family relationships are conceptualized in other western jurisdictions.

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relationship”. (1990 Report at para 2.21) In contrast, the Law Commission of England and Wales considered the point in considerably more detail (2011 Report at para 3.20).

<sup>874</sup> Chapter 6, 6.2.2.

<sup>875</sup> Appendix 1, scenario 5 (Part A).

## CHAPTER 7: ATTITUDES TOWARDS RECONSTITUTED FAMILIES

### 7.1 Introduction

The previous chapter established that stepfamilies – an important subset of today’s blended families – are an increasingly important feature of the “new” Scottish family landscape. In addition, it showed that the impact of re-partnering and remarriage is not limited to the formation of new “parental” relationships, but also results in the formation of new sibling relationships. This chapter will consider my research findings in regard to these relationships and argue that perceptions of both stepchildren and half-sibling entitlement depend largely on whether the deceased and the putative beneficiary had a “family-like” relationship.

The same research scenario was used to evaluate stepchildren and half-sibling entitlement.<sup>876</sup> Part A addressed half-sibling relationships while Part B addressed stepchildren entitlement. In designing the scenario, a deliberate choice was made to include a “young” stepfamily, where the stepchild had been raised by the deceased, in order to present a family grouping at the opposite end of the spectrum from the one presented in scenario 1 (first family/second family).<sup>877</sup> The objective was to explore whether attitudes were different towards stepchildren in close family units than they were towards stepchildren who were such through affinity alone in a first family/second family dynamic. By creating a scenario where the deceased had adult children from a previous relationship, I was also able to explore the dynamic between half-siblings who had not grown up together. Consideration will first be given to the findings in relation to stepchildren.

### 7.2 The entitlement of stepchildren to inherit from step-parents

The research scenario involved a woman, Laura, who died and left her estate to be divided between her husband, their daughter and Laura’s two children from a previous marriage.<sup>878</sup> She did not make any provision for her seven year-old stepson, Kris, who had lived with the couple since he was two years old. Participants were

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<sup>876</sup> Appendix 1, scenario 5.

<sup>877</sup> Appendix 1.

<sup>878</sup> See appendix 1, scenario 5, (Part B).

asked whether the stepson should be able to claim legal rights and to explain what motivated their view. The participants were not as supportive of the stepchild as might have been anticipated given the findings of the 2005 Survey.<sup>879</sup> Indeed, 10 of the 17 participants who were presented with the scenario opined that the outcome was acceptable and that the child did not need to be protected by a legal entitlement.<sup>880</sup> Nevertheless, even those who found the outcome to be reasonable did not necessarily wholeheartedly endorse the deceased's decision, with Catriona remarking that "you'd have to be a real nasty piece of work to have a child living with you and not (provide for them)."

The figures from my research project cannot be generalised, but it is perhaps unsurprising that support for stepchildren appeared to be lower in this study than in the 2005 Survey as, given the open-ended nature of the questions, participants were able to express far more nuanced views. Indeed, many participants expressed views that shifted in the course of the conversation, often retreating somewhat from their original position. Three, for example, proclaimed that no distinction should be made between stepchildren and "natural" children, but later went on to qualify their statements: two argued that no distinction should be made as long as the children were minor children,<sup>881</sup> and two argued that no distinction should be made as long as they had lived together as part of a family unit.<sup>882</sup> The remaining eight participants were unwilling or unable to make a definitive judgment,<sup>883</sup> arguing that many factors would have to be taken into consideration. Overall, however, while many participants could see good reasons for stepchildren inheriting in certain circumstances, no support was expressed for *all* stepchildren automatically inheriting from their step-parents.<sup>884</sup> In discussing why they considered a stepchild to be entitled or not their reasoning tended to cluster around four central arguments: the status-based

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<sup>879</sup> See discussion in Chapter 6, 6.4.

<sup>880</sup> Carol, Joan, Olga, Mona, Andy, Maureen, Gladys, Mark, Lucy and Catriona. A further two participants, Sally and Caroline, appeared undecided, three expressed no opinion, and two favoured equal treatment. Of the four Group 3 participants who expressed a general view on stepchildren, two leaned towards equal treatment (Gillian and Malcolm) while two accepted differential treatment (Simon and Kevin).

<sup>881</sup> Malcolm and Laura.

<sup>882</sup> David and Laura (Laura advanced both arguments).

<sup>883</sup> Some of these participants argued both positions, without appearing to have a stronger preference for a particular argument.

<sup>884</sup> As mentioned above, David did initially make this statement, but then qualified it. The support for stepchildren expressed by Mary, Laura and Malcolm appeared to be based on an understanding of a stepfamily where the step-parent is a substitute parent, and Gillian spoke only to her own situation.

entitlement of a legal child; the inevitability of the parent-child transfer; the age of the stepchild; and the quality of the relationship between the stepchild and the step-parent.

### 7.2.1 Status

In general, the participants did not question the entitlement of biological children to inherit. Views differed as to how *robust* an entitlement children should have, but there was little outright hostility to children being able to claim on a parent's estate. As discussed earlier, several reasons for this were cited, all of which alluded, directly or indirectly, to the "special" relationship between the parent and the child. Two central observations can be made about the parent-child relationship: firstly, it exists from the moment the child is born (or perhaps even conceived) and does not have to be earned; and, secondly, it is a "no-exit" relationship. While these are not universal truths, they nonetheless hold true in many cases. For many participants, this status was not extended to stepchildren. Gladys, for example, was unequivocal that a line had to be drawn separating the biological children from the stepchild:

He has his father to provide for him and his mother to provide for him, although she doesn't seem to be in the picture very much. Maybe a small bequest to him. But I don't think it should be the same share as to her biological children.

For her part, Catriona did not condone the stepmother's decision to exclude the stepchild entirely, but, echoing Baroness Hale, argued that it was "fair enough" to love—and to treat—stepchildren differently. For these participants—and perhaps for the others in their groups who offered no rebuttal to the positions expressed by Catriona and Gladys—the biological (and presumably adopted) children were considered as entitled simply by dint of being biological children. Stepchildren were not viewed as having the same status-based entitlement.

One participant, however, stood out in emphatically rejecting this position:

David: My mind would be not to distinguish between stepchildren and biological children. Because if the argument is that there should be an automatic inheritance for family members, and a stepchild is typically a member of the family. It may be that a stepchild has very little family contact

because the parental relationship is formed when the child is 16, 18, 30, but exactly the same thing happens with biological children. They're not brought up, especially with men, it's not an uncommon scenario for men to have children by three or four different women ... so I just think that all the children, including stepchildren, should have legal rights, as a general presumption. Possibly you might want to add some sort of rider to it, you might want to add that the stepchildren must have lived in the family home because they might not have if the relationship was formed late.

In a sense David's argument is perfectly cogent and intellectually appealing: not all biological children are close to their parents and equally not all step-parent/stepchild relationships are fraught; a case could therefore be made for including everyone. However, his final comment—suggesting that the stepchild would have to have lived in the family home—contradicted his initial remarks and realigned him with those who argued that there is a difference between the biological children and the stepchildren.

David's desire to over-include rather than under-include is understandable in order to avoid the "harsh anomalies" that exist when all stepchildren are excluded.<sup>885</sup> The question is whether the inclusion of stepchildren as automatic beneficiaries is likely to deliver the "right" outcome in more cases than excluding them. In order to assess this, more information would be needed as to the make-up of Scotland's stepfamilies. In the absence of such information, and given that such information is very unlikely to be definitive, other options such as discretion or different rules for different types of stepfamilies should be considered.

### 7.2.2 The inevitability of the parent-child transfer

In her dismissal of the stepchild's claim, Gladys touched on a second reason for continuing to exclude stepchildren that was commonly advanced by the participants. The stepchild, she argued, has his father and his mother to provide for him. This was a persistent view and 10 out of the 15 participants<sup>886</sup> who commented on the stepchild's exclusion in the scenario stated that it did not matter that he was not provided for as he would be provided for by his surviving parent:

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<sup>885</sup> DP 136 at para 2.73.

<sup>886</sup> Caroline, Carol, Joan, Mona, Maureen, Andy, Mark, Gladys, Catriona, Lucy. The scenario was presented to 17 participants, but two did not comment on it.

Carol: My first reaction is that that's OK, because she has not just left it to her three biological children, she's left it to her three biological children and her husband and I presume she's thinking that in due course her husband's share will pass to Kris.

The symbolic value of inheritance was also at the forefront of the concerns participants expressed about *not* making a provision for the stepchild. Laura suggested that the stepmother should not “cast out” the stepchild while Sally felt it would be a terrible “blow” to the child. This may have been exacerbated as the stepchild did not have a strong relationship with his own mother. The participants' discomfort may have been all the greater as it is considered “unnatural” for the mother (or mother figure) to reject her child.<sup>887</sup>

### 7.2.3 Age

The stepchild in the scenario was seven at the time of the stepmother's death and several participants were asked to consider whether his age affected their view. Laura felt that it did, but it was not only the age of the child at the time of the step-parent's death, but also the age of the child when the step-parent assumed the parental role.

No that doesn't seem reasonable there. Because she's taken on a mother's role and he's been living with them for five years, which is as long as her own daughter. He is, just what I was saying before, part of the family unit. I think he should inherit.

Interviewer: Would you think an older stepchild who hasn't lived as part of a family would have the right to inherit?

Laura: That's a hard one, isn't it? I think if you are under 16, you are a child, you should be treated equally to the other children ... If he was an adult who hadn't grown up as her child then that's different. It's to do with how the bonds are formed and the relationships, I think. If you have a mother/son relationship you shouldn't be casting them out after you're dead. That could be pretty damaging psychologically, isn't it, whereas an adult, you're like, I've never lived with her, only related through marriage, you are out on your own in the world, you have to be a bit more bullet proof by that point.

For Sally the inherent vulnerability of youth also exacerbated the harshness of the decision:

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<sup>887</sup> It should also be noted that most co-residency stepfamilies involve the legal mother and a step-father (ONS *Focus on Families* (2005), 4 available at <http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/family-demography/focus-on-families/2005/index.html>) and, as such, it may have been appropriate to construct the scenario to reflect this.

I suppose it doesn't seem unfair but I suppose the bit that I went to is *oh my God Kris has lived with them for five years* and so to not feel ... because I suppose money does sort of like ... it can equate, well when we're talking about this, it equates with love in some ways, so it's like, *you might have lived with me for five years but I don't love you as much as my own children*  
 Catriona: But that's fair enough as well, don't you think?  
 Sally: It is, but when you are seven, what a blow! Obviously, she didn't know she was going to die when he was seven.

Interestingly, although the participants wanted to “protect” young children, they did not advance needs-based or aliment-based argument but instead focused on the emotional damage of being left out by the “mum” figure in your life.

In a scenario such as this, where a mother/child relationship has clearly been established, the participants' concerns were understandable. In Group 3, where participants were simply asked if stepchildren should have legal rights, there appeared to be no obvious “right” answer, even when children were young:

Malcolm: I don't know, if you get remarried when the kids are 14 and they've only been children for four years, if you like, if they're in that new relationship, then ... if it's four months, four years, does it really matter. They are children at that point in time.  
 Kevin: What if they then split up with the partner? Should they retain any kind of rights? Should that be the cut-off? Maybe that's where the cut-off comes.

This raises the question of whether it is age alone that is the decisive factor or whether, in fact, it is a belief that the younger the stepchild is when the relationship is formed, the more likely the stepchild and step-parent are to form an enduring relationship similar to that perceived to exist between parents and their children.

#### **7.2.4 The existence of a family relationship**

While youth rendered stepchildren vulnerable in the minds of some participants, closer examination suggests that their views were primarily shaped by the fact that a younger child was felt more likely to have experienced the stepchild/ step-parent relationship as a parent-child relationship:

Simon: I can see there is some merit in the law having a say in a situation where there are stepchildren who have been part of a family ... then that's obviously a bit tricky. How long have they been part of the family? What age were they when they came? All these factors come into play and I think that is tricky.

This was perhaps the clearest message to emerge from the data: a stepchild who was raised as a child of the family should not be discriminated against because she does not have a blood-tie to the person who fulfilled the parental role in her life.<sup>888</sup> This is felt to occur when the step-parent was involved in the child's life from her youngest years and is still involved in an ongoing relationship with her at the time of the step-parent's death. Although such circumstances may arise when the child's second parent has died, this is not the only case in which such relationships develop. However, equating step-parenthood with parenthood is more fraught when there is a second legal parent in the child's life. Unfortunately, consideration of how a second parent, who was no longer living with her child following divorce, would feel about the step-parent's claim to the title of "parent" is beyond the scope of the study.

### 7.3 Stepfamilies in practice

A number of participants had experience of being either a stepchild or a step-parent. Those in a step-parent relationship were Ron, Gillian and Lauren. A further four participants had experience of being stepchildren. All seven participants had very diverse experiences of being part of a stepfamily, none of which resembled the archetypal version depicted in the scenario. This diversity was extremely useful in exploring not only the range of attitudes towards step-parents, but also the range of experiences lived by step-parents and the expectations of stepchildren.

#### 7.3.1 Being a step-parent

Of the three step-parents only one was a step-parent under the legal definition of the term although, as her stepchildren did not live with her, it is not immediately clear that they would necessarily be classed as "accepted" children of Gillian's new family

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<sup>888</sup> Miss Scobbie noted that, when preparing their wills, many clients sought to exclude potential step-grandchildren and adopted grandchildren. However, once such children became part of their family unit, their views sometimes changed, even among those who had been firm in their initial position.

unit.<sup>889</sup> All three became involved in stepfamily situations at different life stages and all three were at different places on the family formation continuum. Ron was a re-partnered widow and a *de facto* step-parent. He and his new partner met in their 60s and both had adult children from previous relationships; the couple's wills provided for each other through liferents and pension allocations, but the beneficiaries under both wills were their respective children. Ron enjoyed a close relationship with his partner's children but had made no testamentary provision for them. One cannot guess at all the reasons underpinning the decision not to include his *de facto* stepchildren, but the lack of a parent-child relationship, coupled with the existence of his own children, would seem obvious factors.

If Ron were married, his partner's children would be his stepchildren, which could raise complexities if stepchildren were given an automatic entitlement. This is exactly the type of family unit the SLC sought to exclude from claims for non-patrimonial loss, and it would seem equally reasonable to exclude such claims in a succession context. Certainly, in scenario 1, where a mother's estate passed to her second husband and then, upon his death, to his children on intestacy, nobody felt that second husband's children had any "right" to inherit what had belonged to Kate, his pre-deceased spouse, as they had not been part of her life for long and she was considered to have greater responsibilities to her own children. The potential for over-inclusion that could arise in Ron's situation is one of the reasons that potential stepchildren's rights should not arise based on the legal, affinity-based definition of step-parenthood.

The second example of a step-parent, Lauren, was divorced and in a new relationship with a man who had children from a previous relationship. Lauren also had a young son and was contemplating having another child with her new partner. She had no will but stated that her will would benefit her son and any future children. When asked whether she would include her stepchildren in her will, she was more cautious as she did not yet consider herself a stepmother:

I guess you would. It's hard for me to say because I'm no' in that mindset right now. It's still really early, we don't even live together, I only see his kids

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<sup>889</sup> Gillian's new family unit would, however, still be classed as a stepfamily in the Census, as her son lives with the couple and is a stepson in relation to Gillian's husband.

every now and again. But I guess you would. If we're living together and he's there looking after Brooklyn, he's there full time, Gavin's there full time and his kids are over when they are over I suppose you would. It brings up some sort of question though doesn't it?

Interviewer: It does ...

Lauren: Or does his go to his and does mine go to mine. But what about ours together?

Interviewer: Exactly. Explains legal rights. Explains stepchildren do not currently have a claim. Do you have a view on that?

Lauren: I think I would need to live in that for a while but instantly, if you are asking me now, for me not living in it, I would say you would have some sort of responsibility to do that. I would hope Gavin would think that for Brooklyn, and I would think I would definitely think that for Lewis and Ella. I would think so. I would (not entirely convinced).

Interviewer: Do you think it would depend on the age of the children or whether you lived together?

Lauren: I suppose it does depend how much you see them, how much they are actually in your life. You're not going to give your money away to strangers are you? You're not. I wouldn't. It would go to my boy. But if they are in my life two three times a week, absolutely I would feel, I would feel that I would want to. I wouldn't feel as if it would be the law, but I'd feel as if I'd want to.

Lauren's view on the entitlement of stepchildren contrasted sharply with her view on the entitlement of children. She was one of the staunchest supporters of the child's right to the parent's estate, speaking of the "responsibility" that was incumbent on parents who had chosen to bring a child into the world. Her comments suggest that she believed stepchildren may "earn" the right to a share of the estate through a sustained, close relationship with the step-parent.

Gillian offers a third view based on the traditional, affinity-based conception of step-parenthood. Gillian was the only participant to fall within the legal definition of a step-parent and she referred to her husband's daughters as her stepchildren. However, even Gillian's family model did not correspond to the model outlined in the 2005 Survey, whereby the step-parent replaced the original parent. Gillian had never lived with her stepdaughters and while she first stated that she was "close" to the girls she later admitted that the relationship with one was very fraught. Although the children were around nine years old when Gillian began her relationship with their father she did not appear to have a parental role in their regard.

Gillian did not have a will but had a verbal agreement with her husband that their respective property would pass to the survivor and, upon the death of the second

spouse, would be divided equally between the children on a per capita basis. In a sense, Gillian's son "lost out" as he will receive a third share rather than a half (her husband has two children) of the couple's assets, but for Gillian this was unimportant. However, when it was put to her that this decision reflected the important relationship between the step-parent and the stepchild she dissented:

And it is more difficult when they live with their mum because you don't have that family unit, although I'm close to the girls but as far as I'm concerned it's more to do with the fact that they are Martin's daughters.

It is noteworthy, however, that while she clearly perceived marriage as a greater commitment than cohabitation she did not necessarily view the stepchildren's entitlement as flowing directly from marriage; rather, she framed their entitlement in terms of the strength of her relationship with her second husband.

Gillian was proud of the success of her second marriage and suggested that her ex-husband would not follow the same format with his new partner:

Well they are not married, they don't have the best relationship, they've got an OK relationship. From what I can gather my ex-husband has no intentions of getting married again. Very much it's his house. She's in the home that I lived in, how she can do that I don't know. I'd have it sold and we'd buy something together. But she's probably got common law wife status, she's been living with him for so long. I think my first husband will probably - he wouldn't see her out of a home - but I think, you know, it will go to Liam. She's got a daughter but I think it's quite separate. Her stuff to her kid and his to Liam. I think that's how it will be.

For Gillian, her ex-husband's decision was interpreted not on the basis of him being a good parent, but rather on being a poor partner. This is starkly contrasted with her own relationship where "we share" both in life and "when we're not here." Providing for the stepchildren is merely a testament to the strength of her marriage.

Gillian also implicitly recognised that her sense of responsibility to her son, and confidence in her husband to share that responsibility, had evolved over time. When she separated from her first husband she took out a life insurance policy to benefit her son and has never changed the beneficiary:

It's just, it was just ... I wasn't long married and I just thought, you know what, I want to protect, not that I thought Martin (ex-husband) would take it all or whatever, that's not what was behind it, but it was still very much that he was my boy and he was still young, he wasn't working, he was at college or university, and I thought if anything happens to me I want to make sure that he is looked after. It was more to do with that.

This once again confirms the view that the step-parent role, and status, evolves and deepens over time.

### 7.3.2 Being a stepchild

The experiences of the four participants who were stepchildren were also varied and, again, did not conform to the traditional image of a new family unit where the stepchild regards the step-parent as a substitute parent. None of the participants who were stepchildren had an expectation of inheriting from their step-parent.

Caroline's mother was a widow who had a long-term life partner, although the couple maintained separate residences. Caroline fully expected to inherit from her mother but found the notion of inheriting from her mother's partner absurd, as while the relationship was warm it was "by no means parental." Maureen and Andy appeared to have had more fraught relationships with their step-parents and laughed at the idea of receiving an inheritance.

Interviewer: Does anyone have any experience of stepfamilies?

Andy: I've got a step-dad so if you're getting the law changed I'd have a bit (laughter).

Maureen: I've got a step-mum.

Interviewer: You've got step-parents. Would you anticipate that your step-parent would provide for you?

Maureen: No, not at all. I would know that.

Interviewer: Did either of you grow-up in a family home with the step-parent?

Andy: No

Maureen: For a couple of years, but no.

Neither participant divulged any more about their relationship with their step-parent, but there was no sense that it was any way familial. Furthermore, Andy suggested that provisions allowing stepchildren to make a claim would simply be open to abuse:

I think that opens up ... because your ageing mother might remarry and all of a sudden you've got a step-dad who you've got no relationship with and if they change it to you have a legal right then, you know, two people are going to get rich: stepchildren and lawyers. If you've got a legal right to it then there's gonna be some chancer who will test the law.

Chris offered yet another version of the stepfamily. Chris was raised by his grandparents although he maintained good relations with his parents, both of whom remarried. Chris's mother had been married to her second husband for over 25 years when he died unexpectedly, intestate. The entire estate passed to Chris's mum and, while Chris acknowledged that the deceased "probably should have left provisions for his kids" (Chris's stepsiblings), he had no expectation that his stepfather would provide for him.

The question of his stepfather's children being entitled to a share of their deceased father's estate resurfaced when Chris's own mother died. Chris spoke candidly about his initial intention to share his inheritance from his mother with his stepsiblings from her former marriage in recognition of their deferred claim on their deceased's father's estate. However, when the estate was significantly depleted in a protracted inheritance dispute with his mother's third partner, Chris's position changed:

But I felt a certain moral duty to do it, but I think in a very selfish ... not a very selfish way ... but in a selfish way you look after your own family first. And when there was £200,000 odd coming to us I was thinking, yes I think it's right to give them some but when you see that sum dwindling away and you worry about your kids' education and things you want to do to your house. I think if you had got the full amount then I would have given them some, but I think that idea I had changed as the money dwindled away.

Chris's decision was also influenced by the discovery that Anastasia, one of his stepsisters, was not in fact his stepfather's daughter, but the child of an extra-marital affair. Although Anastasia was raised by Chris's stepfather, the discovery that she was not his genetic daughter appears to have — in Chris' mind — further diluted the legitimacy of her claim.

In summary, none of the stepchildren had any feeling of being entitled to their step-parent's estate and only one step-parent planned to provide for her stepchildren. Furthermore, while several of the participants (Caroline, Lauren, Andy) alluded to the

nature and quality of the relationship between the step-parent and the stepchild, the one step-parent who does plan to provide for her stepchildren was motivated purely by her duty to her husband.

To a certain extent, the stepchild versus biological (or adopted) child argument is analogous to the married versus cohabiting argument. Rightly or wrongly, there appears to be a general acceptance that biological children and spouses gain rights from the moment the relationship is formed — regardless of the quality of the relationship — whereas stepchildren and cohabitants have to “earn” rights. In the case of the step-parent/stepchild relationship, this distinction is not necessarily attributable to a reactionary worldview that prizes the sanctity of the nuclear family. Instead, it reflects a view that, unlike the immediate, no-exit relationship formed between parent and child, the step-parent/stepchild relationship is one which is negotiated over time, and which may or may not outlive the relationship between the natural parent and the step-parent. Certainly, this was the personal experience of the participants who were part of stepfamilies, and it was also an idea that resonated with those who had no direct experience of stepfamilies.<sup>890</sup>

#### 7.4 Half-siblings

As aforementioned, scenario 5 also addressed half-siblings. As time was limited in both the interviews and the discussion groups, and as the question related to a secondary theme of this thesis, the scenario was presented to only four groups and three individuals. However, presenting the scenario to only a limited number of participants was unproblematic as the point of “theoretical saturation” was reached fairly quickly and it was not felt that further data was required to “illuminate the concept.”<sup>891</sup> Overall, while it cannot be said that the respondents were unanimously against equal sharing between siblings and half-siblings – the wording of the question did not readily allow such a response – there was unanimous agreement that the *status quo* was acceptable, or as one participant put it, there is no “obvious grievance” with the current regime.

The scenario was devised both to allow for the exploration of different types of half-

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<sup>890</sup> My findings also reflected those made in the NatCen study (2010), 59.

<sup>891</sup> Bryman (2008), 542.

sibling relationships and to evaluate the factors the participants used to calculate entitlement to inherit on intestacy. In the scenario, Jack and Emma were of a different generation from their half-sibling Charlotte and had not been raised together although there was no animosity between them. Nevertheless the “first” family and the “second” family were not a family unit. This scenario was chosen as the SLC had expressed concern that, when discussing stepfamilies, participants had a particular type of very close-knit family in mind and that this influenced the opinions expressed.<sup>892</sup> In an effort to avoid participants considering only those “blended” families that mirrored “nuclear” families the decision was made to focus on half-siblings who had not lived together.

The participants were first asked whether they thought the current position, where the half-sibling did not inherit, was reasonable. This was often enough to spark a conversation but, where they did not expand on their original answer, they were also asked why they thought it was reasonable (or unreasonable) and whether their opinion would be different had Charlotte grown up with Jack and Emma. Two main views emerged: firstly, Charlotte was not entitled to inherit from Jack as she had not grown up with him<sup>893</sup> (but would have been entitled had they grown up together); and, secondly it was her mother’s responsibility to look after her in terms of inheritance. There was remarkable consistency in the views expressed and the conversation that unfolded in Group 5 encapsulated the dominant narrative well:

Sally: It seems ... it seems as reasonable as you can get. I suppose it would feel weirder if Jack and Charlotte were closer in age...

Lucy: I was just thinking that.

Sally: So actually it would be more, Charlotte would have more sense of losing a brother rather than possibly somebody who is closer in age to an uncle, almost. It would just feel weird that her sister ... again it would feel like a sister ... would get money and she wouldn’t. It would feel different.

Interviewer: So if they’d grown up at the same...

Sally: Yea, at the same sort of level, with a different relationship ... but, I mean again, what can you do, you can’t really sort of pick out all these different variations. That does seem like a pretty reasonable thing to do.

Laura and Gladys, participants from two separate groups, expressed a similar view but focused specifically on the notion of a first family and a second family:

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<sup>892</sup> DP at para 2.73.

<sup>893</sup> This is in contrast to his full sibling, Emma, whose right to inherit was not disputed.

Laura: No, no, especially as she's five. She's a child. She's not got any relationship with him. There's no, you know, he's got a relationship with his sister, they are a family unit and then she's kind of gone on to have another family unit, separate to that. I would say definitely it should just go to the mother and the sister. I think that's right.

The second view to emerge from the discussion was that Charlotte's mother was responsible for ensuring she was provided for in terms of inheritance. This was initially surprising, as the question had not been framed to elicit views on parental obligation; nevertheless, it serves as an important reminder that the parental duty to provide is a well-entrenched social norm. While the participants all recognised that the current rule could create "unfair" outcomes, they all concluded that any injustice would be mitigated by what they perceived as the inevitability of the mother providing for Charlotte, either sharing with her in life or passing on to her in death. The following are just two of the many excerpts that illustrate this point:

Mark: I really don't have too much of a problem with that especially since the mother's getting some, you know, of the estate anyway and presumably Charlotte would benefit from it, you know.

Moira: I don't think so, she's only five. I think the mother would. There's a line, isn't there, in my head anyway, there's a line, an inheritance line.

The influence that the mother's presence had on the participants' attitudes was unanticipated and, with hindsight, it may have been preferable to use a scenario which considered siblings and half-siblings in isolation. Of course, from an alternative perspective, the data also illustrates the multiplicity of factors that come into play in determining "entitlement," particularly in blended family situations.

When pressed as to why they held the views that they did, the participants were clear that the lack of a meaningful relationship between the half-siblings was problematic and could not be overcome simply by any status derived from a shared parent. As such, they were equally clear that their views would likely be different had the children grown up together:

Gladys: I think that probably would make a difference. You would then have a

better chance of a good relationship. Maybe.

Laura: Yes. If they'd lived together, grown up together, if they were a family unit then that would be different. And I think then yes. But there is no relationship there. There has to be an established relationship there you know to have a feeling that you should be inheriting something.

Three main conclusions can be drawn from the scenario: Charlotte has no obvious entitlement as she did not grow up with Jack in a “family unit;” Charlotte would likely have had an entitlement had she grown up with Jack as part of the same family unit; any need Charlotte experiences will be met by her mother who will either “make a provision” for Charlotte, if she feels it necessary, or pass Jack’s estate on to her indirectly when she herself passes. Of course, it must be recognised that, had the scenario been worded differently, with the half-siblings being inseparable, responses (or at least initial responses) may have been different, with more emphasis on equal sharing.

However, the participants did consider alternative circumstances where the half-siblings were close and ultimately appeared to conclude that, in the case of half-siblings, the emotional connection and family-like relationship were more important than a blood tie. It is difficult for objective legal rules to address “closeness” between siblings and it is, therefore, difficult to see how the situation could be satisfactorily resolved.

### 7.5 Alternative models

The approaches favoured by the SLC with regard to stepchildren and half-sibling entitlement appear out of step with public attitudes. On the one hand, the SLC acknowledged that there was considerable support for step-children<sup>894</sup> but did not adequately develop how this support could be recognised in succession law; on the other hand, while there appears to be no obvious dissatisfaction with the status quo in relation to half-sibling entitlement,<sup>895</sup> the SLC opted to propose change.

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<sup>894</sup> 2009 Report at para 2.31. See also NatCen study (2010), 59.

<sup>895</sup> Neither the NatCen study nor the 1986 SLC survey appeared to reveal any real dissatisfaction with the status quo. The NatCen study found full siblings still to be favoured over half-siblings (NatCen (2010), 65) while the SLC study showed slightly greater support for equal treatment (1986 survey). Neither study suggested that a strong desire for change existed.

The challenges the SLC faced were not insignificant: there is little doubt that a blanket inclusion of stepchildren in succession law would create as many – if not more – injustices than the current situation. However, the rise in number of these families means that the question cannot be ignored. In a similar vein, excluding half-siblings when full siblings are present undoubtedly produces injustices, yet it is not clear that the proposed remedy will produce an overall benefit.

### 7.5.1 The accepted child of the family

The current statutory framework does not recognise the step-parent/stepchild relationship and consequently the relationship gives rise to no legal obligations in the context of succession. This is not necessarily problematic as providing an entitlement for all step-children would likely be overly inclusive. However, “the social phenomenon of step parenthood” is recognised and taken into account in other areas of the law through the concept of “child of the family.”<sup>896</sup> Two formulations exist: “accepted” as a child of the family and “treated” as a child of the family, with treated now being the more commonly used of the two.<sup>897</sup> As Norrie has remarked, “treatment is an act” and “acceptance is a state of mind, so it “may well follow...that treatment is easier to prove than acceptance, being susceptible to direct evidence.”<sup>898</sup> However, he also recognised that “each case is so dependent on individual facts that much the same evidence would be led in either case.”<sup>899</sup> This model could perhaps be considered in relation to step-families.

Given the obvious difficulties in ensuring a fair and consistent approach, it is worth considering what factors are relevant in assessing whether “acceptance” has occurred. Norrie stated, unsurprisingly, that “simply tolerating a child living under the same roof does not suggest acceptance.”<sup>900</sup> It is easy to imagine that such situations occur not infrequently and, certainly, the descriptions of stepfamily life provided by Andy and Maureen hinted more at tolerance than acceptance. Norrie also stated that “acceptance as a child of the family probably requires an intention for the

<sup>896</sup> Norrie, K. McK, “What the Civil Partnership Act 2004 does not do” (2005) 6 *SLT* 2005 35 at 38.

<sup>897</sup> *Ibid.* For example, accepted is still used in the FLSA in relation to aliment and financial provision while the Children (Scotland) Act 1995 uses treated.

<sup>898</sup> *Ibid.*

<sup>899</sup> Sutherland (2004) at para 214.

<sup>900</sup> *Ibid.*

arrangement to be permanent, or at least indefinite.”<sup>901</sup> In this Norrie references the fifth category of parenthood, intentional parenthood, identified in 6.3.2.5 above. While concerns about reducing parenthood to “intention” are understandable, the concept of “intention” in the step-parent/stepchild relationship might prove useful in distinguishing between different types of relationship.

An obvious difficulty in using the “accepted child” model in a succession context is that the deceased cannot express any view on the matter. While in an aliment case the putative acceptor can put forward his case, in a succession case it would be for the acceptee to argue that the acceptor had accepted him or treated him as a child of the family. While the approach is clearly not without difficulties, it would nevertheless translate into law an idea expressed by many participants in the study; namely, that a stepchild who was part of the family unit ought to be treated differently from a stepchild who was a stepchild by affinity alone.

### 7.5.2 Stepchildren in other jurisdictions

The question of how, if at all, succession law should reflect the stepchild/step-parent relationship has gained particular traction in the US. In 2008,<sup>902</sup> the Uniform Probate Code was amended to include step-descendants as intestate heirs where the decedent leaves no other heirs.<sup>903</sup> While it might be argued that *any* recognition of the step-parent/stepchild relationship carries an important expressive function, it is not clear that including stepchildren as the heir of last resort acknowledges the importance of the step-relationship in some contemporary families. As such, the provision suffers from the same risks of under-inclusion and over-inclusion identified in relation to stepchildren in cases of non-patrimonial loss.<sup>904</sup> It therefore seems unlikely that this would prove an effective means of approaching the question.

Some commentators have pointed out that the exclusion of stepchildren from many US succession statutes has a disproportionate effect on same-sex couples. This is due

<sup>901</sup> Wilkinson and Norrie (2013) at para 13.05.

<sup>902</sup> Gary, SN, “Probate definition of family: a proposal for guided discretion in intestacy” (2012) 45 *University of Michigan Journal of Law Reform* 787 at 805.

<sup>903</sup> Section 2-102(1)(B) provides that if no spouse or grandparents or descendants of grandparents survive the decedent, any descendants of a deceased spouse or spouses (step-descendants of the decedent) may inherit.

<sup>904</sup> See 6.2.1 above.

to “a combination of state marriage laws and adoption statutes” which forces most same-sex couples to designate one parent as the legal parent.<sup>905</sup> The coalescence of these two factors is not limited to parental determination but has a “trickle down” effect on children’s inheritance rights on intestacy:<sup>906</sup> where the law does not allow the second (same-sex) parent to adopt the gestational or biological child of her spouse, the child cannot inherit from her second parent. This concern has not escaped the attention of commentators in Canada, despite the country’s more progressive stance on same-sex marriage and adoption. Perhaps reflecting historical inequities, the 2011 Canadian census found that while 12.5% of opposite-sex couples with children were stepfamilies, close to half (49.7%) of same-sex couples with children were stepfamilies.<sup>907</sup> This has led to the suggestion that current Canadian intestacy provisions have an adverse impact based on sexual orientation.<sup>908</sup>

In 1983, perhaps in response to marriage inequity, California became the first US state to enact legislation treating the step-parent/stepchild relationship as a parent-child relationship for the purposes of intestate succession.<sup>909</sup> The Californian model sets out a two-pronged test, requiring that (i) “the relationship began during the child’s minority and continued throughout the joint lifetimes of both the stepchild and stepparent”; and (ii) that the stepchild has established that the stepparent would have adopted the child but for a legal barrier.”<sup>910</sup> Reflecting the asymmetrical nature of the parent/child (or step-parent/stepchild) relationship, the statute provides only for the stepchild (or step-descendants) to inherit.

While the legal barrier branch of the test might provide assistance to same-sex spouses who are unable to adopt each other’s adopted or biological/gestational children, it has not been without criticism. In particular, it fails to “recognise that a meaningful parent-child relationship may exist without the intent or desire to legally

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<sup>905</sup> For an explanation see Beekman, J, “Same-sex second-parent adoption and intestacy law: applying the Sharon S. Model of simultaneous adoption to parent-child provisions of the Uniform Probate Code” (2010) 96 *Cornell Law Review* 139.

<sup>906</sup> *Ibid* at 140.

<sup>907</sup> Statistics Canada, *Portrait of Families and Living Arrangements in Canada*” (2012), available at <http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.cfm>.

<sup>908</sup> Hamilton, JW, “A cautionary tale for step-parents and stepchildren” (2015), available at <http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.cfm>.

<sup>909</sup> Cremer (2011) at 94.

<sup>910</sup> California Probate Code s 6454. Note that the section also applies to the foster parent/foster child relationship.

recognise the relationship through adoption.”<sup>911</sup> This of course recalls Bainham’s exhortation<sup>912</sup> that a distinction should be drawn between the post-divorce (or post-death) step-parent and the step-parent who is the only parent the child has ever known. Nevertheless, even where the step-parent/stepchild relationship is not considered to be absolutely analogous to the parent/child relationship, some families will want to recognise it upon the step-parent’s death. Thus, while the second branch of the Californian test would seem to have little application in the Scottish context (particularly since the advent of marriage equality), the first branch of the test encapsulates a view expressed by many participants and could perhaps serve as a starting point in determining whether or not a stepchild should inherit.

### 7.5.3 Half-siblings in other jurisdictions

The entitlement of half-siblings to succeed on intestacy has also been addressed by law reform bodies in other jurisdictions in recent years and, as a result, several jurisdictions either no longer distinguish between full and half-siblings or have “pending recommendations” to remove any distinction.<sup>913</sup> In Australia, for example, the New South Wales Succession Amendment (Intestacy) Act 2009<sup>914</sup> abolished the distinction between half-blood and full-blood siblings<sup>915</sup> while the Tasmanian Intestacy Act 2010 redefined a person as a brother or sister of another person if they have one or both parents in common.<sup>916</sup> Similarly, in Canada, the Wills, Estates and Succession Act of British Columbia allows for half-siblings to inherit from the deceased in their capacity as “descendants of the intestate’s parents or parent”,<sup>917</sup> and identical provision is made under section 4(4) of the Manitoba Intestate Succession Act (1990).

Nonetheless, some jurisdictions do preserve differential treatment between half and full siblings: Quebec, for example, provides for half-siblings but accords them a lesser

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<sup>911</sup> Cremer (2011) at 95.

<sup>912</sup> Bainham (1999), 44.

<sup>913</sup> LC 2011 Report at para 3.18.

<sup>914</sup> S 101. The new intestacy rules follow the Model Intestacy Bill of the Uniform Succession Laws Project and complete “the comprehensive reform of succession law” enacted in New South Wales (Peart and Vines (2015), 357).

<sup>915</sup> The Law Society of New South Wales, *The Succession (Amendment) Intestacy Act 2009: A Commentary* (2009), 14.

<sup>916</sup> Intestacy Act 2010 s 4. NSW and Tasmania are the only states to have adopted the intestacy rules proposed in the uniform succession laws project (Peart and Vines (2015), 357).

<sup>917</sup> WESA, s 23 (2)(c).

share. The distribution of an intestate estate involving half-siblings is neatly illustrated by the following example provided by the Quebec Justice Department:

*Ralph dies without having made a will  
He is married to Pauline and has no children.  
He has three brothers: Louis and Roger, who have the same parents as Ralph,  
and Peter, who has the same mother but whose father is the mother's second  
spouse.*

The division of the estate is explained as follows:<sup>918</sup>

Louis and Roger are whole-blood brothers of Ralph (the deceased) and Peter is a uterine brother of Ralph. Since Ralph was legally married to Pauline, the family patrimony<sup>919</sup> will first be partitioned and then the matrimonial regime<sup>920</sup> will be liquidated. Ralph's succession consists of the remainder. Let us say the succession amounts to \$45,000; this is how it would be divided: Pauline, his spouse, receives 2/3 of the succession, or \$30,000. The remaining 1/3, or \$15,000, is divided in equal shares among the brothers in the paternal line (\$7,500) and the brothers in the maternal line (\$7,500). There are two brothers in the paternal line, Louis and Roger, and they each receive one half of the portion passing to that line, or \$3,750. There are three brothers in the maternal line, Louis, Roger and Peter, and they each receive one third of the portion passing to that line, or \$2,500. Since Louis and Roger are in both lines, they share in the portion passing to each line so they each receive \$6,250. Peter's share in the succession is \$2,500.

This solution has the merit of providing recognition for the half-sibling, while simultaneously acknowledging that the relationship is not necessarily equivalent to a full-sibling relationship. This does not guarantee that it will provide a satisfactory outcome in all cases: for example, Ralph may see no difference between his half-brother and his full brothers or, at the other extreme, he may have had no relationship with Peter and consequently may have wished him to be entirely excluded.

Nevertheless, it might be thought to be a reasonable compromise for those who reject

<sup>918</sup> Justice Quebec, *Successions*, available at

<http://www.justice.gouv.qc.ca/english/publications/generale/success-a.htm>.

<sup>919</sup> Justice Quebec defines family patrimony as the net value of "all family residences; furniture used by the family in the residences; motor vehicles used for family transport; benefits accrued during the marriage or civil union in a retirement plan" (Justice Quebec, *Successions*, available at

<http://www.justice.gouv.qc.ca/english/publications/generale/success-a.htm>).

<sup>920</sup> Justice Quebec defines the matrimonial regime as "a system of rules that governs the economic relationship between spouses, and between the spouses and third parties... Most importantly, the matrimonial regime determines how property that is not included in the family patrimony is partitioned when a marriage is dissolved following a divorce, death or legal separation, or when a couple makes a change in matrimonial regime." (Justice Quebec, *Marriage*, available at

<http://www.justice.gouv.qc.ca/english/publications/generale/maria-a.htm>).

any form of judicial discretion in succession law. According to the Law Commission of England and Wales, which also studied the question, this option was also favoured by “a couple” of its consultees.<sup>921</sup>

The conclusions on half-siblings contained in the Law Commission’s 2011 Report were based partly on the findings of the NatCen study.<sup>922</sup> The NatCen survey asked participants what should happen to a man’s property where he died leaving only a brother and a half-sister. The participants had to select from a range of options and the results showed that 53% favoured the brother,<sup>923</sup> either leaving it all to him (18%) or by giving him priority (35%), while 45% favoured equal sharing.<sup>924</sup> Ultimately, however, the Law Commission decided not to recommend amending the current English legislation for a number of carefully considered reasons.

Firstly, the Law Commission made the important point that reform would not change the distribution in a large number of estates as the number of people dying who leave no spouse, descendant or parent, but both full and half-siblings is likely to be fairly low.<sup>925</sup> It is thought likely that the same observation could be made in relation to Scottish decedents. Secondly, when considered together with the Law Commission’s other principal argument, the lack of a “strong majority opinion,”<sup>926</sup> the wisdom of maintaining the status quo seems clear. Simply put, the situation does not arise frequently and, where it does, it is not clear that there is an obvious “right” answer enjoying widespread support.<sup>927</sup>

Interestingly, while both the SLC and the Law Commission consider the entitlement of half-siblings, neither appears to address stepsibling entitlement. As succession law is historically based on ties of consanguinity, this is unsurprising; however, excluding such a key relationship creates a noticeable gap in the policy debate. The decision not

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<sup>921</sup> 2011 Report at para 3.26.

<sup>922</sup> *Ibid* at para 3.25.

<sup>923</sup> At first blush, the Scottish and English surveys revealed significantly different results, with 58% of Scots supporting equal division compared to only 45% of the English and Welsh. However, the Scottish survey dates back almost 30 years and opinion may have changed since then.

<sup>924</sup> NatCen study (2010), 64.

<sup>925</sup> 2011 Report at para 3.22.

<sup>926</sup> *Ibid* at para 3.19.

<sup>927</sup> The Law Commission also advanced a third argument, namely that unequal sharing (as in the Quebec model) would lead to “more complex estate administration.” As the Quebec model attests, such complexity is not an insurmountable obstacle (2011 Report at para3.25).

to consider stepsiblings is particularly unusual in that a family unit may comprise siblings, stepsiblings and half-siblings. In such circumstances, it may happen that the sibling and the half-sibling inherit,<sup>928</sup> but the stepsibling does not purely due to the lack of a blood tie. There is no doubt that the presence of a biological relationship is still important in determining inheritance entitlement, as was evidenced by the discussion around the right to know one's genetic origin,<sup>929</sup> but it is no longer the sole factor that merits consideration. In the interests of completeness, it may therefore have been appropriate for the SLC to address stepsibling entitlement more fully.

#### 7.5.4 Discretion

No discussion on the inclusion of stepfamilies can be held without addressing the question of discretion. In its 2009 Report, the SLC stated that there was “an overwhelming consensus among our consultees that a court-based discretionary system must be avoided” regarding both spousal provision and provision for children.<sup>930</sup> Other commentators have endorsed this view. Professor Vines, for example, has written extensively about the pattern of disproportionality in Australian family provision estate litigation, whereby a high proportion of estates are consumed by costs in protracted disputes.<sup>931</sup> Closer to home, *Ilott v The Blue cross and others*, described as having taken an “unconscionable time” to reach resolution, serves as a cautionary tale against the use of discretion.<sup>932</sup> In the elite interviews conducted in this project, Miss Scobbie expressed the view that discretion was unlikely ever to prove popular in Scotland while Professor Gretton expressed his support for a rules-based system, citing concern about cost and delay.<sup>933</sup>

However, while these concerns are not easily dismissed, unqualified rejection of discretion may simply no longer be tenable. The “absolutist” traditions of succession

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<sup>928</sup> For example, Audrey and Hakim re-partner. Audrey has two children, Ben and Oliver, from a previous marriage, and Hakim has one, Jodi. The three children are under 5 when their parents meet. Audrey and Hakim then have another child, Calli. Many years later Ben dies, leaving no parent and no descendant: under the current rules, only Oliver would inherit, whereas under the new rules Oliver and Calli would inherit. In such circumstances, there would seem to be little reason to exclude Jodi.

<sup>929</sup> Chapter 6, p189.

<sup>930</sup> 2009 Report at para 3.5.

<sup>931</sup> Vines (2011) at 1.2.

<sup>932</sup> *Ilott v The Blue Cross and others* [2017] UKSC 17 at para 28.

<sup>933</sup> This finding was unsurprising given the criticism that has been levelled at the discretionary scheme that allows cohabitants to apply to the court for an award from a deceased's intestate estate (FLSA, s.29). For further discussion see 2009 Report at paras 4.1-4.8.

law may have been appropriate when only narrowly circumscribed categories of relationship were deemed “worthy,” but this is no longer the case. As such, other commentators have argued that a degree of discretion may be appropriate. Sheriff Cusine has argued that “the system of legal rights...ought, on occasion, to have its rigidity tempered by a discretion vested in the courts,”<sup>934</sup> while Cremer has argued that a “mechanical test, although easily administrable, lacks viability, as the complexities involved in a relationship would be oversimplified and would likely fail to meet the intent of the step-parent and stepchild.”<sup>935</sup> Finally, Gary has cautioned that “ease of administration and predictability” now appear to “supersede intent and need as goals of intestacy statutes” in the US,<sup>936</sup> a shift that means succession law may no longer meet public expectations.

Despite hostility towards the use of discretion, it is already employed in other areas of family law<sup>937</sup> and, as such, the courts should not encounter undue difficulty applying it in the context of succession law. In the US context, Gary proposed “a relatively straightforward intestacy statute (excluding stepchildren), with a rebuttable presumption that the statute applies.”<sup>938</sup> Where the presumption did not apply, the court would turn to the “categories of potential heirs” in the statute and consider the relevant list of factors in order to determine whether a person should qualify for an intestate share.<sup>939</sup> This would have the clear advantage of avoiding “trying to pin down every possible variation, which inevitably results in over-inclusion in some cases and under-inclusion in others.”<sup>940</sup>

It is noteworthy that the SLC, while opposing discretionary rules for spouses and children, accepts discretion for cohabitants.<sup>941</sup> Section 22 of the Draft Bill set out a two-pronged test whereby the court would first determine whether the surviving partner had been “living with the deceased in a relationship which had the characteristics of the relationship between spouses or civil partners” before then

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<sup>934</sup> Cusine, DJ, “Legal rights: a little discretion required?” (2014) 3 *Scots Law Times* 13 at 13.

<sup>935</sup> Cremer (2011) at 97.

<sup>936</sup> Gary (2012) at 791.

<sup>937</sup> See, for example, Cremer (2011) at 93; Gary (2012) at 791; Cusine (2012) at 14.

<sup>938</sup> Gary (2012) at 811.

<sup>939</sup> *Ibid.*

<sup>940</sup> *Ibid* at 812.

<sup>941</sup> Despite the criticism of the s.29 provisions, the SLC has chosen to main a discretionary approach, but clarified the criteria that will apply in assessing a claim.

determining to what extent the applicant should be treated as a spouse or civil partner for the purpose of the rules of succession.<sup>942</sup> It might be thought that a similar system could be employed for stepchildren, perhaps relying on similar wording to that used in the first branch of the Californian test. Both the Californian test and the test proposed by the SLC in relation to cohabitants are very general in nature and seek to include relationships that are analogous to their officially sanctioned counterparts – marriage and legal parenthood – while excluding those where no functionally equivalent relationship exists.

If the model were also to include similar criteria to those proposed for determining whether parties were cohabitants, such as whether they were (or had been) members of the same household, whether they enjoyed a stable relationship and whether they appeared to be members of the same family,<sup>943</sup> the risk of over-inclusion, so evident in a purely rules-based system, would be avoided. Beyond the obvious benefit to the individuals involved, including a discretionary claim for certain categories of stepchildren would “create long-term positive effects by increasing the accuracy of intent effectuation in intestacy statutes and by providing support for a greater number of members within a blended family.”<sup>944</sup>

The same arguments that have been advanced in support of discretion in determining stepchild entitlement could also be employed to support limited judicial discretion in cases of half-sibling entitlement. Certainly, Gary’s comments as to the futility of trying to create legal rules for all classes of kin relationships are as relevant here as they were in relation to stepchildren:<sup>945</sup>

As drafters try to address more possible scenarios...the number of scenarios continues to expand. An intestacy statute has always been a one-size-fits-all proposition, and even with the increasing numbers of provisions that try to fine-tune the application of the intestacy code, the statute might be less likely than more likely to match what the decedent wanted. However, as it is not thought likely that many people will die intestate, survived only by both siblings and half-siblings, the need to reform the law on half-siblings (and

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<sup>942</sup> 2009 Report at para 4.13.

<sup>943</sup> The two other factors proposed in section 22 of the draft bill, whether the parties had a sexual relationship or whether they had children together clearly would not apply.

<sup>944</sup> Cremer (2011) at 105.

<sup>945</sup> Gary (2012) at 811.

indeed stepsiblings) is less pressing than the need to address the step-parent/stepchild relationship.<sup>946</sup>

## 7.6 Future trends: the three-parent family?

One of the fundamental features of the status of legal parenthood is that, in relationship to any given child, it cannot be held simultaneously by more than two individuals. This legal reality reflects what appears to be a deeply-held belief that children are “not entitled to more than two parents.”<sup>947</sup> Bainham argues this entrenched position raises “deep philosophical questions,”<sup>948</sup> but it would appear that these questions have thus far gone unnoticed in the Scottish legal community. Indeed, an attachment to this belief appears to underpin much of the objection to stepchildren inheriting. Norrie made the following observation:<sup>949</sup>

Perhaps an even more serious objection to giving stepchildren and accepted children right on intestacy is that the class of children would then be entitled to two (or perhaps even more) inheritances: the more a family is reconstituted, the more disparate will be the claims of children depending on their life experiences.

The SLC makes a similar point, arguing that provision for stepchildren would put the accepted child in a better position than an adopted or biological child.<sup>950</sup> This is a perplexing argument as differences already exist: children in rich families will be in a better position than children in poor families, while children in large families will fare worse than an only child when a similar sized estate is available. Furthermore, the purpose of an intestacy regime is generally considered to be to give effect to the deceased’s supposed intent,<sup>951</sup> rather than to ensure equality across the general population, an aim an intestacy regime seems ill-fitted to achieve.

The unassailability of this idea has, however, been challenged by some U.S. commentators, and some U.S. states already recognise the concept of three-parent

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<sup>946</sup> It would seem more probable that a stepsibling would be in competition with a deceased’s children for a share of the step-parent/parent’s estate than in competition with a sibling for a share of another sibling’s estate.

<sup>947</sup> Bainham, 44.

<sup>948</sup> *Ibid.*

<sup>949</sup> Norrie (2008) at 79.

<sup>950</sup> 2009 Report at para 2.33.

<sup>951</sup> Cremer (2011) at 107.

families in specific circumstances. The Uniform Probate Code provides that “if the spouse of either genetic parent” adopts a child, the child will still be able to inherit from and through the parent who is no longer a parent. As Gary explained, the statute provides for asymmetrical inheritance, in favour of the child: while the child can inherit from her mother, father and step-father, only the mother and step-father and their relatives can inherit from the daughter.<sup>952</sup> In a similar vein, Pennsylvania’s intestacy statute maintains a link between the adopted child and her genetic family in very narrow circumstances. The adopted child has a claim on the estate of a member of her genetic family if the deceased “maintained a family relationship with the adopted person.”<sup>953</sup>

In British Columbia, a more radical approach has been introduced. Presumably in recognition of new family realities, British Columbia already allows three parents to become legal parents of the same child. BC’s Family Law Act allows the “potential birth mother, a person who is married to or in a marriage-like relationship with the potential birth mother, and a donor who agrees to be a parent together with”<sup>954</sup> them to be the parents of the children. This change may have been driven by same-sex couples but could, theoretically, apply to opposite-sex couples.<sup>955</sup> According to one prominent Vancouver-based lawyer, the shift reflects changes in the way in which British Columbians conceptualise parenthood and family:<sup>956</sup>

In the old days, we looked at biology and genetic connections. And that’s no longer true. We now look at the intention of the parties who are contributing to the creation of the child, and intend to raise the child. And that’s a really, really big shift.

While to suggest that intent replaces biology and genetic parenthood (or indeed social parenthood) is perhaps to overstate the case, it is clear that it does play a role. It seems that the British Columbian model was primarily designed to address the needs of

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<sup>952</sup> Gary (2012) at 801.

<sup>953</sup> *Ibid* at 802.

<sup>954</sup> Section 30(b)(ii). Note that section 30(b)(i) provides for the same outcome, but where the birth mother is the “third parent,” rather than a member of the couple.

<sup>955</sup> An opposite sex couple might also use ART and wish to confer parental status on the birth mother who carries the child.

<sup>956</sup> McCarthy, T, “This baby is the first in British Columbia to have 3 parents listed on her birth certificate” *Huffpost* 2 November 2014, available at [http://www.huffingtonpost.com/2014/02/11/baby-with-3-parents-birth-certificate\\_n\\_4767402.html](http://www.huffingtonpost.com/2014/02/11/baby-with-3-parents-birth-certificate_n_4767402.html).

same-sex couples who intended, from the outset, for their child to have three “equal” parents in the eyes of the law. However, as Cremer observed, a three-parent model can develop in stepfamilies to the extent that a child has three meaningful parent/child relationships: relationships with the legal father, legal mother, and step-parent.<sup>957</sup>

Although the BC Act does not explicitly reference inheritance rights, it allows parentage rights to be conferred on three parents “for all purposes of the law of British Columbia.”<sup>958</sup> This includes inheritance rights as, simply put, “a child’s legal parent is the person under the law from whom a child would inherit.”<sup>959</sup> This means that children whose parents have availed themselves of this provision will inherit from three parents. Further research would be required to determine whether demand for a similar model exists in Scotland; however, in this model, where there are three co-parents from the outset, may be less controversial than “mum” or “dad” feeling their position threatened by the arrival of a new step-parent post- divorce or separation.

### 7.7 The SLC’s objections to providing recognition for stepchildren

Although stepchildren are dealt with only briefly in the 2009 Report, they were discussed at length in the SLC Discussion Paper that preceded it, with a primary focus on intestate succession. Ultimately, the SLC rejected introducing any provision for stepchildren; however, given they were choosing between extending rights to *all* accepted children and stepchildren or *no* accepted children and stepchildren, the decision was perhaps sound. Nevertheless, if the assumption that discretion is undesirable is set aside, meaning that rights could be extended to some stepchildren and not to others, the SLC’s conclusion is less robust.

The first argument advanced by the SLC is that intestate succession is traditionally a matter of blood relationships.<sup>960</sup> This is unquestionably true, but it is also a tradition that has already been modified better to reflect contemporary values: prior to the enactment of the 1964 Act, a surviving spouse was not an heir on intestacy (and consequently had no entitlement to a share of the free intestate estate) as she had no

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<sup>957</sup> Cremer (2011) at 107.

<sup>958</sup> Section 23(1).

<sup>959</sup> Continuing Legal Education Society of British Columbia *The Family Act: Everything you Always Wanted to Know* (2013) at para 6.1.5.

<sup>960</sup> DP 136 at para 2.75.

blood relationship to the deceased. The introduction of the right to succeed to the estate under section 2(1)(e) of the 1964 Act was considered “one of the more radical departures from the common law,”<sup>961</sup> but from a contemporary perspective is wholly uncontroversial. There seems little reason why a further adaptation could not be made to bring the law into line with new contemporary reality and social values. While blood relationships remain important, they remain important only insofar as most people love their children and most people have a blood tie to their children: questions of lineage, purity and tradition did not appear to be foremost in people’s minds during the discussion groups. Given the recognition of social parenthood in other areas of the law, it seems unusual to close the door entirely to the possibility of allowing it to form the basis of a succession claim in some circumstances.

A second problem highlighted by the SLC is the perceived difficulty “in establishing whether or not the deceased had accepted a child to the required extent” if the deceased died many years after the child had left home.<sup>962</sup> This is an understandable concern but one which is not insurmountable, as evidence of an on-going relationship akin to a parent-child relationship could still be led.

## 7.8 Conclusion

The right to succeed to a parent’s estate has always been treated as an important right in law. As discussed above, it is a right that exists regardless of whether the parent has parental rights and responsibilities. The SLC was therefore rightly concerned that conferring succession rights on stepchildren “would be to give acceptance to a legal status equivalent to the much more formal procedure of adoption.”<sup>963</sup> This is a compelling argument when it is considered that not all parents who accept a child as a child of the family want to take on a full “no exit” parental relationship. It would, therefore, seem inappropriate to provide automatic inheritance rights, either on testacy or intestacy, to all stepchildren.

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<sup>961</sup> Hiram (2007) at para 4.29.

<sup>962</sup> DP 136 at para 2.75.

<sup>963</sup> *Ibid* at para 2.77.

However, stepfamilies or blended families are becoming the new norm. Cremer estimates that in the US more than half the population belongs to a blended family<sup>964</sup> and such a significant demographic cannot simply be ignored. Including a provision that allows for stepchildren to inherit not only provides comfort for individual children on the death of their step-parent, but clearly signals an acceptance of the idea that stepchildren can be full family members too. As Gary explained:<sup>965</sup>

Intestacy statutes serve as a statement of what society considers family to be, because they define who counts as a family member. This expressive function is important in validating family members' relationships.

As has been observed, not only can heirship statutes reflect social norms and values, they also shape those norms and values by recognising and legitimising relationships.<sup>966</sup> For this reason, a rebuttable presumption excluding stepchildren, but with the possibility of some level of provision where certain criteria apply, merits further consideration. While stepchildren may in some – even many most – instances be awarded less than legal children, the relationship would still be given some recognition. In the interests of consistency, there appears to be no obvious reasons why such provision would not be available in cases of both testate and intestate succession.<sup>967</sup> Certainly, the SLC has proposed that the discretionary provision currently available to cohabitants under section 29 of the FLSA be extended to testate estates.<sup>968</sup>

With regard to half-siblings, there seems little option but to accept that, as with any legal rule, there will be winners and losers: if the distinction remains some half-siblings may be devastated to find themselves left out; if the distinction is abolished some half-siblings will be felt to have inherited “undeservedly.” Fundamentally, one solution will not fit all. Thus, while it is undoubtedly true that the SLC had unanimous

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<sup>964</sup> Cremer (2011) at 103.

<sup>965</sup> Gary (2012) at 789.

<sup>966</sup> *Ibid.*

<sup>967</sup> Although there will be many cases where stepparents will deliberately not include stepchildren for sound reason (e.g. where no relationship exists or where the relationship is very new), there may also be cases where, for example, a stepparent forgets to update a will or omits to provide for a stepchild despite the estate being largely derived from the stepchild's parent. In such cases, there would be value in the stepchild being able to apply for a discretionary legal share.

<sup>968</sup> 2009 Report at para 4.8.

support for the specific question it asked stakeholders in its consultation process,<sup>969</sup> it is not clear that this can be translated into unanimous support for the proposal at a nationwide level. My own research indicates that there is no real dissatisfaction with the current system and, in the absence of further, more conclusive research, it seems that there would be some merit in following the English stance<sup>970</sup> and maintaining the *status quo*.

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<sup>969</sup> 2009 Report at para 2.37.

<sup>970</sup> 2011 Report at para 3.27.

## Conclusion

In its 2009 Report, the SLC proposed significant changes to the Scots law of succession. This thesis has argued that these changes are misguided insofar as they are out of step with public attitudes. Although the SLC set out to address the increased diversity of contemporary family formations,<sup>971</sup> the solutions it proposed were silent on stepfamilies and retreated from any attempt to address meaningfully the needs and expectations of those who are part of a first family/second family dynamic. Instead, and without any apparent justification, the parent-child relationship became a focal point of the reforms.

The misalignment between the identified social shift and the reform proposals suggests that, as Dot Reid has argued, ideological factors are at play.<sup>972</sup> As the law is inherently political, this is both unsurprising and entirely reasonable; nevertheless, it is equally reasonable to expect that the ideology the law expresses is broadly consistent with the norms that govern people's lives.<sup>973</sup> Attitudinal research undertaken by Finch and Mason, NatCen and the Rowntree Foundation, allowed for a clear articulation of the way in which these norms operate in relation to inheritance in England and Wales; however, no such research had been undertaken in Scotland. It was in light of this vacuum that my empirical study of public attitudes towards inheritance and parental obligation was developed.

Contemporary family formations display considerable diversity and are no longer defined exclusively in terms of biology or long-term monogamy. Nevertheless, this thesis started from the premise that the two pillars of the family identified by the Scottish Institutional writers (husband and wife, and parent and child)<sup>974</sup> continue to occupy a central role in the lives of many Scots. Although today's couples may be same-sex, unmarried and/or child-free by choice – and while parents may or may not be biologically related to their children – committed adult partners and/or children normally feature in people's definition of my family *where they have such*

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<sup>971</sup> 2009 Report at para 1.3.

<sup>972</sup> Reid (2008) at 397.

<sup>973</sup> *Ibid* at 404.

<sup>974</sup> See discussion at 3.2.

*relationships*. Of these two key relationships, this thesis focussed on the parent-child dyad, the relationship that is the primary target of the reform process.

In studying the parent-child relationship, consideration was given not only to inheritance norms in intact families, but to the degree to which these norms were affected by parental re-partnering. Furthermore, attention was turned to some of the many new relationships that arise in complex family units, specifically stepchild/step-parent relationships, stepsibling relationships and half-sibling relationships. Finally, consideration was also given to expectations between spouses with regard to any obligation the surviving spouse owes the pre-deceased spouse.

A qualitative project was chosen as the best means of exploring the complexities, nuances and contradictions in public attitudes to succession. The cursory quantitative research carried out by the SLC in 2005 – and the more nuanced quantitative research conducted in 1986 – demonstrated strong public support for children receiving a share of a deceased's person's estate (both on testacy and intestacy);<sup>975</sup> but, for reasons that were never adequately explained, the SLC chose largely to ignore these findings. Even more importantly, the participants in the SLC's surveys considered only very simple scenarios: they did not engage with what people felt to be fair in different circumstances and they did not contextualise individual relationships against wider family dynamics. My project addressed these gaps in knowledge and illuminated the interplay between the multiple factors that inform people's views on inheritance.

The findings of my study echoed those of the NatCen and Finch and Mason studies in many respects, affirming that children enjoy a privileged position in the inheritance narrative, both in cases of testate and intestate succession.<sup>976</sup> This does not mean that the children's entitlement is viewed as stronger than the spouse's entitlement; instead, the two are viewed through different lenses. The spouse's entitlement flows from a conceptualization of marriage as a partnership, whereas the children's entitlement is an affirmation of love at the end of the parent's life.

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<sup>975</sup> 2005 Survey at paras 2.5-2.9 (intestacy) and paras 2.17-2.22 (testacy) and 1986 Survey at 227 (intestate) and 233 (testate).

<sup>976</sup> See Finch and Mason (2000), 59 and NatCen Study (2010) Chapter 5.

Nevertheless, the children's entitlement is not absolute, but depends on the interplay between a host of factors. While these factors were diverse in range, a number of guiding principles can be identified to explain when and why children are considered entitled to inherit. As was the case in other studies,<sup>977</sup> the participants relied on the various principles in at times inconsistent or contradictory manners, with particular tension existing between the principles of testamentary freedom and parental obligation. However, although testamentary freedom and forced heirship provisions are often presented as irreconcilable values, the majority of participants sought a means to reconcile both freedom and responsibility.

### Principles underpinning attitudes to inheritance

#### 1. The parental obligation principle

The study suggested that participants considered parents to have a life-long, "no exit" obligation towards their children. The obligation was not primarily conceptualized in financial terms: parents were not viewed as having a duty to alleviate financial need in adult children or to conserve assets to pass on to their children. However, participants, the vast majority of whom were themselves parents, did perceive parents to have an obligation to love their children and to reaffirm the parent-child relationship at the end of their life by including them in the final disposition of their estate.

This obligation, given legal effect through the operation of *legitim*, was willingly assumed by parents and did not depend on the children providing their parents with the same level of reciprocal support. Certainly, there was little hint that *legitim* is perceived as a "legal disability"<sup>978</sup> to be overcome. Finally, and contrary to the SLC's proposed reforms, participants made virtually no distinction between the entitlement of adult children and that of young children. This is because inheritance is not viewed as a source of aliment but as an expression of love and affection and a marker of good parenting.

#### 2. The relationship principle

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<sup>977</sup> See for example NatCen Study (2010), 21.

<sup>978</sup> DP 136 at para 3.100.

As explained by the NatCen researchers, attitudes towards entitlement in cases of inheritance are framed largely by bilateral relationships between the deceased and the potential beneficiary.<sup>979</sup> In some instances, entitlement flows from a putative beneficiary's status as a member of a particular relationship dyad: for example, spouses and children are normally viewed as automatically entitled.<sup>980</sup> In other instances, subjective factors, such as a close and loving relationship, were central to establishing entitlement. These subjective factors were particularly important in assessing the entitlement of stepchildren and half-siblings, relationships that flow from reconstituted or complex families. Nevertheless, subjective factors were at times relevant when evaluating status-based entitlement insofar as an obvious lack of an emotionally close relationship could, in certain cases, reduce a child's entitlement.

### 3. The fairness principle

Fairness was an abiding preoccupation for the participants and was generally viewed through the lens of equal treatment. As has been discussed by several commentators,<sup>981</sup> the normative duty to treat children equally is not easily displaced and, in the context of children and grandchildren, is adhered to "almost invariably."<sup>982</sup> Nevertheless, participants noted that in some instances – for example, where one child was affected by long-term illness or disability – equality of outcome was a more important objective than an equal division of assets.

### 4. The autonomy principle

A fourth principle underpinning attitudes to inheritance was autonomy, which arose in various contexts. Most obviously, the older adult was free to spend his money how he saw fit and was under no obligation to conserve money to leave an inheritance. Equally, however, many participants articulated the concept of autonomy as one that conferred upon older people a "right" to leave a bequest, as opposed to having to dissipate their resources on care costs. Both of these conceptions of autonomy were evidenced in other studies.<sup>983</sup>

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<sup>979</sup> NatCen Study (2010), 19.

<sup>980</sup> Similarly, in a competition between full siblings and half-siblings, full siblings were viewed as automatically entitled based on their status whereas half-siblings were not.

<sup>981</sup> Finch and Mason (2000), 77; Conway (2016), p.35-36.

<sup>982</sup> Finch and Mason (2000), 77.

<sup>983</sup> Finch and Mason (2000), 136; Croucher and Rhodes (2006), 9.

In addition, the principle of autonomy was regularly drawn upon in discussions on testamentary freedom. While testamentary freedom was highly prized and jealously guarded, it quickly became evident on deeper analysis that, for many participants, absolute testamentary freedom was secondary to conceptions of fairness and parental (and spousal) obligation. Where participants expressed concern about forced heirship provisions, their primary fear was not simply that the testator's wishes would be disregarded, but that the law would supplant the superior judgement of the testator and reward an *undeserving* heir; as a corollary, support for testamentary freedom often floundered when a testator was believed to be acting unfairly. Certainly, with one exception, no support was voiced for testators who simply decided to favour one child, or disinherit all of his children, on grounds of simple preference.

Finally, despite the widely-accepted narrative that holds will-writing to be an expression of individual autonomy, my research findings demonstrated clearly that for couples with children, will-writing was not viewed as the act of an individual, but as an expression of joint intent and mutually binding obligation. Many of the participants in the study spoke of "our" will, rather than "my will" and clearly expected the surviving spouse to follow through on what they had drafted together. While the surviving spouse was under no obligation to conserve assets for a bequest, it was clearly understood that any eventual bequests had to give effect to both spouses' intentions. Although some spouses were clear that this was merely a private, moral commitment between spouses, a surprising number were aghast to discover that such agreements were not binding on the survivor.

##### 5. The family property principle

As explained in Chapter 4, the findings of my study did not suggest that property was transgenerationally owned insofar as children had no claim on a parent's property during that parent's lifetime.<sup>984</sup> Moreover, participants demonstrated no interest in preserving the family name or position forward through time. However, children (and to an extent grandchildren) are assumed to be the "rightful" end recipients of

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<sup>984</sup> See Chapter 4, 4.7.3.

property, even when the relationship is not perfect. In this sense, a limited notion of family property exists.

Conceptions of family property were particularly important in complex families. In the context of an “intact” family, parental obligation towards the children is largely deferred until the death of the second parent: while the first parent to die may mark his relationship with his child by passing on sentimental items, there is no expectation that financially significant bequests will be made until the second parent dies.

However, in the context of first family/second family dynamics this obligation cannot be deferred and each parent must individually assume his or her duty. Moreover, in cases where the first spouse has pre-deceased, the surviving spouse’s duty involves not just his duty to his child but also his duty to his pre-deceased spouse: the participants held the view that the pre-deceased spouse had contributed towards the estate the survivor inherited and believed that contribution had to be reflected in any subsequent bequests.

### **Normative expectations**

The operation of these principles was evident through the expectations participants expressed in regard to each other’s behaviour and the behaviour of the fictitious characters in the scenarios. There was a clear normative expectation that “right thinking” people would make some provision for their children at the end of their lives if they were able to do so. Where people did not conform to this behaviour pattern, participants were either swift in their condemnation, or sought to explain why the deviation may have occurred.

The normative expectations differed depending on the relationship and family configuration at issue. With regard to a biological or legal parent-child relationship, the expectation that provision would be made for children was so entrenched that some participants struggled to imagine how else an individual would dispose of his estate. In addition, many parents considered placing the full burden of social care costs on an individual’s shoulders as an unacceptable interference with their right to leave a bequest for their children.

Perhaps most strikingly, the parent-child transfer was viewed as so inevitable in the minds of the participants that a parental bequest was often not perceived as an inheritance. Whereas participants felt flattered to receive a bequest from family members such as aunts and cousins, a bequest from a parent was rendered significant only in its absence. Indeed, where a child was not provided for, participants generally assumed that the decision reflected a catastrophic breakdown in the parent-child relationship. In the alternative, they assumed that some other provision had been made for the child in lieu of a bequest. They did not entertain the possibility that the testator had simply preferred to nominate an alternative beneficiary.

These expectations and assumptions speak to the enormous symbolic value inheritance holds in the context of the parent-child relationship. As Finch and Mason observed, a bequest from a parent to a child is “an expression of attachment” and “the symbol of a lifetime’s commitment as a parent.”<sup>985</sup> Simply put, the parental transfer “equates with love;”<sup>986</sup> thus, if a child is excluded, either at the expense of another sibling or another family unit, the message that the child is loved less is almost impossible to avoid. The weight of this blow is the harder to bear as it is the final communication between the parent and the child and cannot be explained or remediated.

In the context of complex families, while re-partnering did not change the essence of the parent’s duty to his children, it did change the moment at which the parental transfer occurred: it was no longer deferred until the death of the second parent. Equally importantly, the formation of new family units gave rise to other relationships and other potentially entitled beneficiaries. Each of these new relationships raised a range of questions and engaged a new process and new norms for evaluating entitlement.

In a first family/second family dynamic, there was concern that the children of the first family would “lose out” to the new family and an expectation that measures would be taken – either by the state or the individual – to avoid such an outcome. In regard to stepfamilies, the children’s entitlement was viewed from an alternative

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<sup>985</sup> Finch and Mason (2000), p. 86.

<sup>986</sup> As observed by Group 5 participant, Sally See Chapter 4, 4.5.2.4

perspective: rather than considering whether children of the first family “lost out”, the question was whether stepchildren were perceived to “lose out” unjustly if they were not provided for in a will or on intestacy. There was considerable unanimity in the norms expressed by participants and two main arguments emerged. On the one hand, a child who was a stepchild by marriage alone had no right to inherit; however, on the other hand, where a parental relationship had been established between the step-parent and the stepchild some recognition of that relationship was expected.

That said, even where recognition of the step-parent-stepchild relationship was expected, entitlement did not arise automatically but instead depended on the presence of certain factors. Chief among these factors was a relationship that was either functionally equivalent to the parent-child relationship or very close and familial. Such a relationship is not status-based, but is instead gradually acquired. Furthermore, the stepchild/step-parent relationship is not a “no exit” relationship and the obligations it entails may slacken or dissolve if the adult relationship that underpins it ends. As such, the stepchild/step-parent relationship sits uneasily with a strict rules-based system, which often creates either under- or over-inclusive outcomes in such a context.

Ambiguity towards non-nuclear family-based relationships was also displayed in relation to half-siblings. The SLC favours bringing Scotland into line with other jurisdictions and treating half-siblings as full siblings for inheritance purposes.<sup>987</sup> However, the participants in my study did not support this option, stressing that entitlement flowed from the quality of the relationship and not through status. As in the case of stepchildren, half-siblings were considered entitled to inherit only if they were part of the family unit and not simply because of a shared “blood” tie.

## Potential areas of reform

Following the approach adopted by the Rowntree Foundation, NatCen and Finch and Mason, this thesis set out to examine public attitudes to inheritance, rather than to propose law reform measures. Nevertheless, the findings clearly illuminated areas

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<sup>987</sup> 2009 Report at 2.37.

where both the existing law and the reform proposals are out of sync with the public attitudes established in this study. While law reformers must obviously consider public policy reasons other than public preferences, areas where a strong disconnect exists between public expectations and the law clearly warrant further attention.

In cases of intestate succession, my findings added weight to the already preponderant body of evidence demonstrating that there is strong public support for children being recognised in intestate statutes, particularly where the surviving spouse is not the child's other parent. As was discussed in Chapter 1, other jurisdictions have adopted intestacy statutes that reflect the reality of today's complex families by setting a lower preferential share for surviving spouses who are not also the other parent of the deceased's children. Although the Law Commission of England and Wales held such an approach to be "wrong in principle,"<sup>988</sup> it does not appear to have caused consternation in other jurisdictions. While there is undoubtedly room for further empirical research to explore how these regimes are experienced by those who are subject to them, the introduction of parallel intestacy provisions applicable in cases where the surviving spouse is not also the parent of the deceased's children would seem to be consistent with public norms and expectations.

As well as raising issues relating to the protection of children in first families, the increased presence of complex families raises questions as to if and how new categories of kin should be recognised. The enactment of the Burial and Cremation (Scotland) Act 2016 suggests that law makers have already begun to grapple with these questions: section 65(5) of the Act provides that the stepchildren of an adult are to be treated as his children for the purposes of making arrangements for an adult's remains to be buried or cremated. While the provision is in some sense surprising, insofar as it risks being over-inclusive, the desire to recognise that stepchildren can play an important role in a stepparent's life is likely to become an increasingly important consideration in future law reform processes.

Although the Burial and Cremation (Scotland) 2016 Act favours a rules-based approach, the existing research on the rights of stepchildren on intestacy demonstrates

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<sup>988</sup> 2011 Report at 2.68.

that, unlike legal and biological children who have a status-based entitlement, a stepchild's entitlement is based on a combination of factors and, consequently, a strict rules-based approach risks being either- under or over – inclusive. For this reason, academics such as Gary and Cremer have called for the limited use of discretion in such circumstances.<sup>989</sup>

Although judicial discretion is used widely in succession law in other jurisdictions, it garners little support in Scotland; however, defining a role for limited discretion to accommodate the needs and expectations of complex families may become a necessity and is worthy of further consideration. Indeed, while cognisant of the difficulties related to judicial discretion, the SLC nevertheless implicitly recognizes its worth. Whereas section 29 of the FLSA currently applies only to intestate succession, the SLC proposes extending the new regime governing awards for cohabitants to cases of testate succession.<sup>990</sup> Given that the SLC is comfortable charging the court with deciding “to what extent the surviving cohabitant deserves to be treated as the deceased's spouse or civil partner for the purposes of the rules of succession,”<sup>991</sup> it does not seem unreasonable to suggest the court would be equally well equipped to evaluate other relationships arising from complex family formations.

In terms of testate succession, there is no doubt that *legitim* can appear to encroach on testamentary freedom. However, as Gardner has pointed out, “the more correct view” is to realise that in Scotland the power of testing has never extended to the whole estate.<sup>992</sup> Regardless of the view one favours, there is no doubt that, even if *legitim* does constitute an encroachment on testamentary freedom, it has only ever been a partial encroachment and one that appears to enjoy widespread acceptance. While it is clear that the costs of wills variation and family provision claims have raised concerns in other jurisdictions,<sup>993</sup> such models have never been part of the Scottish experience. Instead, as a fixed legal share, *legitim* provides an administratively straightforward means of recognising the parent-child relationship. While there is room to debate whether *legitim* should be exigible against only the moveable estate, the basic model

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<sup>989</sup> Gary (2012) at 811 and Cremer (2011) at 97.

<sup>990</sup> 2009 Report 4.1 to 4.21

<sup>991</sup> Ibid, 4.19.

<sup>992</sup> Gardner (88)

<sup>993</sup> See for example Vines (2011) at 1.2.

of a fixed share is sound and received widespread support from the public in this study.

Finally, while it would be fair to assume that a significant number of step-parents will intentionally – and reasonably – exclude their step-children from their will, there could also be cases of genuine oversight. There is, therefore, merit in also considering a discretion-based entitlement for step-children in testate succession, similar to that proposed by the SLC in regard to cohabitants. By at least opening the door to this possibility, the law can recognise that the relationship some children have with their stepparent, or their *de facto* third parent,<sup>994</sup> can be as meaningful as the relationship they have with a biological or legal parent.

In conclusion, analysis of the data from my research project allowed a number of themes to be developed and a deeper understanding of public attitudes to inheritance to emerge. The interplay between these themes revealed complex and at times contradictory narratives unified around the central question of parental obligations and, while there was diversity in conceptions of these obligations, there was equally much common ground. Above all, inheritance remains an obligation written in the hearts of parents,<sup>995</sup> “grounded in love”<sup>996</sup> and willingly assumed.

This does not mean that the parent has responsibilities only – or even primarily – to their children or that wealth transfers should not be taxed. Nevertheless, where a parent-child relationship exists there is a strong expectation that it be recognised at the end of the parent’s life. Meeting this expectation in an era of increased diversity of family formation is not, however, without difficulties and a one-size-fits-all solution based on consanguinity and affinity is no longer fully adequate. Parliament must take into consideration the needs of stepfamilies and children whose parents have re-partnered before this “once in a generation”<sup>997</sup> opportunity is lost.

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<sup>994</sup> While BC has legalized three parent families – and allows the children in such families to inherit from all three parents – *de facto* three parent families also exist where they are not yet legally recognized, either through polyamorous relationships or in some same-sex relationships (for example, while two mothers may be the legal parent of a child, the child may also maintain a parent-child relationship with the donor father who has no legal status).

<sup>995</sup> Stair, *Institutions*, 1.5.1.

<sup>996</sup> Douglas et al. (2011) at 271.

<sup>997</sup> Scottish Government, *Ministerial Response*, July 2009, available at [https://www.scotlawcom.gov.uk/files/6312/8015/6902/minresp\\_rep215.pdf](https://www.scotlawcom.gov.uk/files/6312/8015/6902/minresp_rep215.pdf).

## Appendix 1: Scenarios and questions for empirical study

### 1. Scenarios

#### Scenario 1

##### Part A

*Kate dies aged 62. She leaves behind her second husband of three years, Dave, and two adult children from her first marriage, Mark and Lucy. Her estate is worth £300,000 and comprises the home that Kate and Dave lived in and £60,000 in savings. The house had been purchased outright by Kate before she met Dave. She leaves her entire estate to Dave.*

- (i) Do you think that Kate has behaved fairly?
- (ii) What could change your opinion on this? How would you feel if...
- Dave was the father of Kate's children?
  - Dave was not the father of Kate's children but had been in a relationship with her for 20 years?
  - Kate's adult children were experiencing financial difficulty whereas Dave was well-off?
  - Dave had just been made redundant but Kate's children were well-off?
  - Kate's estate was worth only £15,000 or £50,000?
  - the £60,000 in savings were the proceeds from a life insurance policy that Kate had been paid when her first husband – her children's father – had died?
- (iii) Under the current law, Kate's children would be able to claim legal rights. In our case, this means that Kate's children would be entitled to claim a one-third share of the £60,000 in savings. This one-third share would be shared between the two children, meaning that Mark and Lucy would get £10,000 each. What are your views on this entitlement?

##### Part B

*Eight months later Dave is tragically killed in a car crash. His children from his previous relationship inherit his full estate, including, obviously, what he had inherited from Kate.*

- (i) How do you feel about this outcome?

#### Scenario 2

*Jamila and Ahmed are killed in a car crash, aged 65. Prior to her death Jamila had been suffering from Parkinson's disease and had required an increasing amount of support in her day-to-day living. They leave behind three adult children. The family had once been close but tensions had grown over the years. Their eldest daughter Aisha has become a highly successful and widely-read blogger writing primarily about her childhood and what she feels was her parents' failure to adequately protect, support and nurture her. Their middle daughter, Karima, moved to Australia ten years ago, aged twenty. She has regular contact with her parents but has only been home twice since she left. Ines, the youngest daughter, lives near her parents and sees them on a daily basis to provide care and support. Hurt and humiliated by Aisha's blog, which they and their other children view as a fabrication, Jamila and*

*Ahmed excluded her from their wills and directed that their estates be divided equally between Ines and Karima.*

(i) Do you think this is fair?

(ii) What, if anything, could change your opinion? For example...

- What if Jamila and Ahmed had in fact subjected Aisha to years of emotional abuse?
- What if Karima were extremely wealthy but Ines struggled to make ends meet?
- What if Ines had given up her job to be her mother's carer?

(iii) Aisha is legally entitled to claim her legal rights (the right we discussed earlier). Do you think she is morally entitled to do so? Does this mean the law is wrong?

### **Scenario 3**

*Malcolm dies unexpectedly aged 65. He had not got around to writing a will. He leaves behind his third wife, Anna, to whom he had been married for 15 years, and a son and a daughter, aged 27 and 25, from his second marriage. When Malcolm separated from his second wife, the children remained with her in Edinburgh while Malcolm moved to Aberdeen to live with Anna. Malcolm was the sole owner of the house in Aberdeen where the couple had lived for the sixteen years they had been together. It turns out that due to a number of factors - the value of the house, the savings available etc. - Anna will be entitled to exactly £366,000. There is nothing left over for the children.*

(i) Is this fair?

(ii) What, if anything, could change your view? For example,

- What if the estate were worth £500,000, meaning that the children would inherit something?
- What if Anna owned three other properties and had no need for the inheritance to put a roof over her head?
- What if Anna had no other property and a poorly-paid job?

### **Scenario 4**

*Lynne and John were married for 30 years. Lynne died at 55 following a long illness. Lynne left her entire estate to John. She was clear that John should live the rest of his life to the full and do all that they had dreamed of doing when they retired. They agreed that, when John's time came, he would pass on whatever was left to their two children. John remarried five years later, aged 60. John's children were pleased that their father was happy. John died unexpectedly aged 68. He had not written a will and due to a number of factors – the value of the house, the savings available etc. – the entire estate passed to his second wife.*

(i) How do you feel about this outcome?

### **Scenario 5**

#### **Part A**

*Georgios and Laura live in Glasgow and have one daughter, Charlotte, aged 5. Laura has two adult children, Jack and Emma, from a previous relationship. Jack and Emma live in Leeds, where they grew up, and have very limited but nonetheless courteous contact with Laura and their half-sister Charlotte. Jack dies in a hiking*

*accident and, as he has no will, his estate is shared between Laura and Emma, as the law requires.*

(i) Do you think that Charlotte should have received something when the estate was divided up?

(ii) Would your answer have been different if Jack had shared a family home with Charlotte, or just even been closer to her?

### **Part B**

**Imagine now that Jack (the son) does not die, but Laura (the mother) does and...**

*As well as Laura's children, Georgios has a son from a previous relationship, called Kris. Kris is seven and had lived with Laura and Georgios from the age of two, rarely having contact with his own mother. Laura dies and leaves her estate to be divided between her husband and her three biological children. She does not make any provision for Kris. As the law currently stands, step-children are not entitled to claim legal rights.*

(i) Should Kris be able to claim legal rights?

(ii) Would your answer be different if Kris were now an adult?

(iii) If the estate were small, whose claim should take priority?

### **Scenario 6**

*Henry and Mavis are both eighty years old and have been married for sixty years. They have lived all of their life in their family home on Arran but must now move into a nursing home. The home is worth £150,000 and the couple have no other assets. Henry's pension does not cover the full cost of the nursing home. Their four children, all of whom have children of their own, live in different cities around Scotland. Every summer, the children and grandchildren return to Arran to spend time in the family home with Henry and Mavis. Henry and Mavis will struggle to meet their nursing home bills but they are determined to leave the house in Arran for their children and grandchildren to enjoy. Two of the children are financially comfortable and two struggle to make ends meet.*

(i) Who should pay for the cost of the nursing home?

### **Scenario 7**

*Mike and Diya met and married when they were 45. They had both been married previously. Although they both came from large, close families – Mike had three siblings and Diya two – neither had had children with their first spouses and they did not have any children together. Diya was killed in a road traffic accident three years later. Her will provided that her entire estate was to go to Mike.*

(i) How do you feel about this outcome?

## **2. Non-scenario-based questions**

1. Have you ever inherited?

- Do you anticipate inheriting
- Who from?

- Have you ever not inherited when you thought that perhaps you might have inherited?
2. Do you have a will?
    - If so, who have you included and why?
    - If not, who would you include and why?
    - Have you discussed your will with the beneficiaries or those not included
    - Did it cause offence?
    - If you have not yet discussed it with the beneficiaries, do you anticipate that it might cause offence?
    - How do you feel about your family's reaction/potential reaction?
  3. Have you seen your parents struggle to afford their retirement/ aged care
    - If so, did you feel that you had in some way “missed out” or that the decision was in some way unfair or unkind?
    - Have you had to help them out financially? Do you feel that you have a responsibility to do so?
    - Did you parents or elderly relatives find planning their finances for later life a source of anxiety?
    - Did they come under pressure from family members to act in a specific way – be it in terms of writing their wills or signing over their house to somebody else?

### 3. Scenarios: Frequency of use

	1	2	3	4	5	6	7
Pilot 1	Yes	Yes	Yes	No	Yes	Yes	No
Pilot 2	Yes	Yes	Yes	No	Yes	Yes	No
Group 1	Yes	Yes	No	Yes	No	Yes	No
Group 2	Yes	Yes	No	Yes	Yes	No	No
Group 3	Yes	Yes	No	No	No	No	No
Group 4	Yes	No	No	Yes	Yes	Yes	No
Group 5	Yes	No	No	No	Yes	No	No
Group 6	Yes	Yes	No	No	Yes	No	Yes
Group 7	No						
Group 8	Yes	No	No	No	No	No	No
Group 9	Yes	No	No	No	Yes	No	No
Group 10	No						
Group 11	Yes	No	No	Yes	No	No	No

## Appendix 2 : Participant profiles

### 1. Basic biographical information

Group	Name	Age	Marital Status	Presence of children	Presence of a will	Home Owner
Pilot 1	Caroline	30-40	Married	Yes	No	Yes
Pilot 2	Mary	50-65	Married	Yes	Yes	Yes
Group 1	John	65+	Married	Yes	Yes	Yes
Group 1	Gordon	65+	Married	Yes	Yes	Yes
Group 1	June	65+	Married	Yes	Yes	Yes
Group 1	Tom	65+	Married	Yes	Yes	Yes
Group 2	Carol	50-65	Divorced	Yes	Yes	Yes
Group 2	Joan	65+	Married	Yes	Yes	Yes
Group 2	Olga	50-65	Married	Yes	Yes	Yes
Group 2	Mona	50-65	Married	Yes	No	Yes
Group 3	Malcolm	40-50	Married	Yes	No	Yes
Group 3	Gillian	50-65	Married	Yes	No	Yes
Group 3	Simon	50-65	Married	Yes	Yes	Yes
Group 3	Kathleen	40-50	Married	Yes	Yes	Yes
Group 3	Jane	50-65	Married	Yes	No	Yes
Group 3	Kevin	40-50	Married	Yes	Yes	Yes
Group 4	David	50-65	Married	Yes	Yes	Yes
Group 4	Maureen	50-65	Married	Yes	Yes	Yes
Group 4	Moira	50-65	Married	Yes	Yes	Yes
Group 4	Andy	40-50	Divorced	Yes	No	No
Group 4	Claire	30-40	Single	Yes	No	No
Group 5	Catriona	40-50	Married	Yes	No	Yes
Group 5	Lucy	30-40	Married	Yes	No	Yes
Group 5	Sally	30-40	Married	Yes	Yes	Yes
Group 6	Gladys	50-65	Married	Yes	Yes	No
Group 6	Mark	50-65	Divorced	No	No	Yes
Group 7	Alec	65+	Married	Yes	Yes	Yes
Group 7	Neil	65+	Married	Yes	Yes	Yes
Group 7	Jim	65+	Married	Yes	Yes	Yes
Group 7	Reg	65+	Married	Yes	Yes	Yes
Group 7	Cyril	65+	Married	Yes	Yes	Yes
Group 7	Bert	65+	Married	Yes	Yes	Yes
Group 7	Bill	65+	Married	Yes	Yes	Yes
Group 8	Lauren	30-40	Divorced	Yes	No	Yes
Group 9	Laura	40-50	Married	Yes	No	Yes
Group 10	Chris	40-50	Married	Yes	No	Yes
Group 11	Ron	65+	Re-partnered	Yes	Yes	Yes

Sample size: 37.  
All names are pseudonyms.

## 2 Analysis of biographical information

### 2.1 Gender

The study involved 18 men and 19 women.

### 2.2 Age

Participants were asked to select one of four age cohorts. Upon reviewing this data, it was immediately obvious that an error had been made in listing the age cohorts, as each tranche offered the potential for overlap with the next incremental level. As this study was not quantitative, this error had no real impact.

Age group	Number of participants	Share of sample (%)
30-40	5	13.5
40-50	7	19
50-65	12	32.5
65+	13	35

The age cohorts can also be examined from a gender perspective:

Age group	# of women	% of age cohort	# of men	% of age cohort
30-40	5	100	0	0
40-50	3	43	4	57
50-65	9	75	3	25
65+	2	15	11	85

While there was an equal gender balance, that balance was not equal across age cohorts. Those in the youngest group were all women while those in the oldest age group were primarily men.

### 2.3 Relationship status

Relationship status	Number of participants	Share of sample (%)
Married/cohabiting in my first relationship	29	78
Married/cohabiting in my second relationship	3	8
Single following divorce/separation	4	11
In a second relationship but does not live with new partner	1	3

## 2.4 Presence of children

36 of the 37 participants had children (97%).

30 of the 36 parents were still in a relationship with the other parent of their children (83%).

Three participants had children from a previous relationship and were in a new relationship.

These same three participants had partners who also had children from a previous relationship.

None of the participants had both children from a current relationship and children from a previous relationship.

Three participants with children from a previous relationship remained single.

One participant had a child from an extra-marital relationship.

## 2.5 Presence of wills

	Number of Participants	Share of sample (%)
Yes	24	65
No	13	35

These figures can also be broken down according to age cohort:

Age group	Number of Participants	Share of age cohort (%)
30-40	1	20
40-50	2	29
50-65	8	67
65+	13	100

These figures are fairly similar to those generated by the Scottish Consumer Council study which found that 14% of participants aged between 25 and 34; 30% of participants aged between 35 and 44; 40% of participants aged between 45 and 54; 52% of participants aged between 55 and 64 and 69% of participants aged over 65 had a will (O'Neill (2006), 6).

### 3. Financial information

#### 3.1 Annual personal income

Income (£)	Number of Participants	% share of completed responses (36)*
Less than 10 000	4	11
10 000 – 24 000	12	33
25 000 – 39 000	11	30.5
40 000 – 59 000	4	11
60 000 +	2	5.5
Decline to disclose	3	8
Response discarded	1	N/A

\* the percentage is calculated as a total of the number who responded to this question (n=36) rather than the total number of participants(n=37)

One response was discarded as it was unclear which box the participant had intended to select. In all, 36 participants gave a clear response, although 3 declined to disclose their personal income.

#### 3.2 Annual household income

Income (£)	Number of Participants	% share of completed responses	% share of overall sample
Less than 10 000			
10 000 – 24 000	6	17	16
25 000 – 39 000	9	26	24
40 000 – 59 000	7	20	19
60 000	10	29	27
Decline to disclose	3	8	8
Response discarded	2	N/A	5

Two responses were discarded as it was unclear which box the participants had intended to select. In all, 35 participants gave a clear response, although 3 declined to disclose their household income.

#### 3.3 Housing tenure

34 of the 37 participants were home-owners (92%).

### 3.4 House value

House value (£)	Number of participants	Share of homeowners (%)	Share of overall sample (%)
Less than 99 000	2	6	5
100 000 to 149 000	3	9	8
150 000 to 190 000	3	9	8
191 000 to 249 000	3	9	8
250 000 to 299 000	8	23	21.5
300 000 to 350 000	8	23	21.5
351 000 plus	5	15	13.5
Not specified	1	3	3
Unknown	1	3	3
Rent	3	N/A	8

The interviews and focus groups were conducted in 2014. At that time, the average house price in Scotland was £163,563 (Registers of Scotland, *House Price Information: Annual Market Review 2014*, available at [https://www.ros.gov.uk/\\_data/assets/pdf\\_file/0016/11338/Calendar-Year-Report-2014.pdf](https://www.ros.gov.uk/_data/assets/pdf_file/0016/11338/Calendar-Year-Report-2014.pdf)).

### 3.5 Percentage of house owned in full

Percentage of home owned (not subject to a mortgage)	Number of Participants	Share of homeowners (%)	Share of overall sample (%)
100	21	62	57
75-99	1	3	2.5
50-74	4	12	11
25-49	3	9	8
0-25	0	0	0
Not specified	4	12	11
Unknown	1	3	3

## 4 Questionnaire

The following questionnaire was distributed to all participants.



The following questions are designed to generate background data for the research project. All information provided will be treated in strict confidence. While your cooperation would be greatly appreciated, you are under no obligation to answer all, or any, of the questions.

1. Are you:

- a) Male
- b) Female

How old are you?

- 30-40
- 40-50
- 50-65
- 65 +

How would you describe your relationship status?

I am single

I am married/cohabiting/in a civil partnership in my first marriage/cohabitation/civil partnership

I am married/cohabiting/in a civil partnership in my second, or subsequent, marriage/cohabitation/civil partnership

I am in a relationship but we do not live together

I am divorced

I am a widow/widower

Do you and your current partner have children together?

- a) Yes
- No

Do you have children from a previous relationship?

- Yes
- No

Does your partner have children from a previous relationship?

- Yes
- No

Do you have a will?

- a) Yes
- b) No

8. What is your annual income?

less than £10 000

£10 000- £24 000

£25 000 - £39 000

£40 000 - £59 000

£60 000+

9. What is your household's annual income?

less than £10 000

£10 000- £24 000

£25 000 - £39 000

£40 000 - £59 000

£60 000+

10. Are you a home owner?

Yes

No

11. Approximately how much would your house or houses be worth?

12. How much, if any, do you still owe on your mortgage or mortgages?

### Appendix 3: Coding

THEMATIC CODE	INITIAL CODE
Expectation	Anger, disappointment, entitlement, surprise.
Autonomy	Respect a choice; “earned” right to decide how to spend assets; wrong to manipulate.
Parental obligation	Parent chose to have children; bank of mum and dad; the inheritance line; safeguards.
Equal treatment	Equality of outcome; avoid showing preference; avoid hurt; fairness.
Good parenting	Don’t spoil; show love; safeguards
Fairness	Treat children equally; treat citizens equally; respect contribution of pre-deceased spouse; avoid causing hurt.
Relationship quality	Closeness, parental, brought up together.
Longevity of parent-child relationship	Contrast with short marriage; continuity through grandchildren; recognition of “good” years even when soured.
Family property	Pre-deceased spouse’s contribution; inevitability of parent-child transfer; dubiety of an outsider’s claim.
Social contract	Paid tax; worked hard; contributed; kicked when down.

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# Land reform, inheritance rights and unintended consequences

Dot Reid and Nicole Sweeney\*

**Keywords:** Succession – Inheritance – Scotland – Children’s rights – Public attitudes – Family law – Housing market

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*The Scottish government is currently consulting on a radical programme of reform of succession law. This article demonstrates that the reforms are part of the government’s land reform strategy, aiming to make Scotland fairer and to treat children equally by ending the distinction between different types of property in an estate. However, the authors show that the proposals will bring about unintended consequences and in the vast majority of cases will result in the children of a parent who is married at the time of death inheriting nothing. It is argued that inheritance law should concern itself mainly with ordinary families of average wealth rather than being distorted by the uncertainties of the housing market. The reforms are contextualised with reference to research studies examining how modern families operate in terms of rights and obligations, and the results of a recent qualitative study of Scottish public attitudes to inheritance are introduced.*

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## Land reform and succession law

In the aftermath of Scotland’s referendum on independence in September 2014 it came as no surprise to find that land reform was a key part of Nicola Sturgeon’s new legislative programme (and her first as First Minister) for the remainder of the Scottish Parliament’s term.<sup>1</sup> There has been growing pressure for land reform over the last decade thanks to the success of land campaigners such as Andy Wightman<sup>2</sup> in bringing the issue to the attention of the public. The assertion that ‘Scotland has the most concentrated pattern of private land ownership in the developed world’<sup>3</sup> has attracted the attention of journalists and opinion makers across Scotland, which in turn has led to criticism of government inaction on the issue. A confident Scottish National Party, intent on delivering progressive policies as the party of government, grasped this particular nettle and made land reform central to its legislative programme.

More surprising was the inclusion of succession law in that programme. It is not a burning issue, as evidenced by the long slow road to the enactment of the Succession (Scotland) Act in 1964<sup>4</sup> and, more recently, the languishing of discussion papers and reports by the Scottish Law

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1 *One Scotland: the government’s programme for Scotland 2014–15* (2014), available at: [www.gov.scot/Resource/0046/00464455.pdf](http://www.gov.scot/Resource/0046/00464455.pdf).

2 A Wightman, *Who Owns Scotland* (Canongate, 1996); A Wightman, *The Poor had No Lawyers: Who Owns Scotland (and How They Got It)* (Birlinn, 2nd edn, 2013). See also his well-visited blog, *Land Matters*: [www.andywightman.com/about](http://www.andywightman.com/about).

3 J Hunter, P Peacock, A Wightman and M Foxley, 432:50 – *Towards a comprehensive land reform agenda for Scotland: A briefing paper for the House of Commons Scottish Affairs Committee* (2013), at para 2.1, available at: [www.parliament.uk/documents/commons-committees/scottish-affairs/432-Land-Reform-Paper.pdf](http://www.parliament.uk/documents/commons-committees/scottish-affairs/432-Land-Reform-Paper.pdf).

4 For the tortuous history leading to the 1964 Act see K G C Reid, ‘Intestate Succession in Scotland’ in K G C Reid, M J de Waal and R Zimmermann (eds), *Comparative Succession Law, Volume II: Intestate Succession* (Oxford University Press, 2015), at pp 380–388.

Commission (SLC) in the government's bottom drawer.<sup>5</sup> The Scottish government is explicit that the main impetus for reform of succession law is the land reform agenda. There is to be a radical overhaul of succession law 'so that all children are treated equally when it comes to inheriting land'.<sup>6</sup>

Succession is a significant issue for land reform because of the way in which the current law of succession is structured. Scotland has never fully embraced freedom of testation: theoretically, 'legal rights',<sup>7</sup> a term of art in Scots succession law, can be claimed on every estate, testate or intestate. Legal rights operate as a protection against disinheritance for both spouse (and now civil partner)<sup>8</sup> and children of the deceased.<sup>9</sup> Solicitors administering an executry must be careful to separate the estate into immoveable (or heritable) and moveable property<sup>10</sup> because of legal rights. If the deceased is survived by both spouse and children, each can claim one third but only from the net moveable estate; if only one of those categories survives they are entitled to claim half. And here is the link with land reform: legal rights cannot be claimed on immoveable property, namely land and buildings. The Scottish Government wants to remove the distinction between different types of property, thus making the whole estate available for succession claims by the immediate family.

The Land Reform Review Group (LRRG) was set up by the Scottish Government in July 2012 to consider the structure of land ownership and to 'develop innovative and radical proposals that will contribute to Scotland's future success'.<sup>11</sup> Section 6 of its final report,<sup>12</sup> delivered in May 2014, is devoted to succession law. The exclusion of heritable property from the legal rights regime is deemed to be outdated and to represent the last vestiges of Scotland's feudal system.<sup>13</sup>

The consistent recommendation of the SLC, from its work in the 1980s to the present day, has been to treat the deceased's property as a whole, always in the face of strong opposition.<sup>14</sup> The LRRG Report holds 'agricultural and landed interests'<sup>15</sup> responsible for much of that opposition and for denying to the deceased's spouse and children the automatic right to inherit immoveable property, which will usually be the most valuable asset in an estate. It recommends that the distinction be abolished as 'a straightforward matter of social justice based on the current disadvantaged position of spouses and children'.<sup>16</sup>

5 The Scottish Law Commission produced a report in 1990, none of which was implemented, see *Report on Succession*, Scot Law Com No 124 (HMSO, 1990). For the most recent proposals see Scottish Law Commission, *Discussion Paper on Succession*, Scot Law Com DP No 136 (TSO, 2007) and the subsequent *Report on Succession*, Scot Law Com No 215 (TSO, 2009).

6 *One Scotland: the government's programme for Scotland 2014–15* (Scottish Government, 2014), at p 77.

7 The umbrella term 'legal rights' includes the *legitim* of children and the *jus relictæ* or *jus relictî* of female and male spouses respectively.

8 Civil Partnership Act 2004, s 131. To avoid repetition, 'spouse' is used in this article to include both a spouse and a civil partner.

9 More correctly the term 'issue' is used in succession law and includes children or their descendants, for a pre-deceasing child can be represented by her descendants in intestate succession and in any claim for legal rights (Succession (Scotland) Act 1964, s 11).

10 Broadly corresponding to the distinction between real and personal property in English law.

11 [www.gov.scot/About/Review/land-reform](http://www.gov.scot/About/Review/land-reform).

12 LRRG, *The Land of Scotland and the Common Good, Report of the Land Reform Review Group* (2014), available at: [www.gov.scot/Resource/0045/00451087.pdf](http://www.gov.scot/Resource/0045/00451087.pdf).

13 The feudal system of landholding was finally abolished on 28 November 2004, Abolition of Feudal Tenure etc (Scotland) Act 2000.

14 LRRG, above n 12, at 6.2.

15 *Ibid.*, at 6.4.

16 *Ibid.* The LRRG recognises that the impact of the change on larger landed estates may not be significant since they are often held by companies and trusts. However, breaking the link between land and succession is still considered to have 'symbolic' importance (*ibid.*).

The connection between land reform and succession reform has been explained at some length to underline the fact that land campaigners have understood that succession law can help them to achieve their aims and have been successful at elevating it onto the political agenda. If legal rights, which take priority over the provisions of a will, can be claimed on land, they would be a mechanism for overcoming the elitism of land ownership by allowing ‘all children of whatever age to inherit in equal measure all heritable and moveable property’.<sup>17</sup> Opening up heritable property to claims for legal rights could potentially alter the land economy of Scotland. As one commentator explains, children ‘would have the right to have land – potentially very large tracts of land – factored into their legal rights’.<sup>18</sup> However, this may be a pyrrhic victory. If the reforms become law legal rights will, in theory, be much more valuable than under the current law. That will certainly be the case for the children of a person who is unmarried at the point of death. However, taken as a whole the reform package will have unintended consequences (unintended at least by the land campaigners): if a parent is married at the time of death the vast majority of Scottish children will inherit nothing, either on intestacy or as legal rights.

The Scottish Government’s stated justification for change is grounded in justice, equality and meeting the public’s expectations of succession law:<sup>19</sup>

‘As part of this modernisation the distinction between movable and immovable property would be removed to give children, spouses and civil partners appropriate legal rights over both forms of property. This should ensure a just distribution of assets among a deceased’s close family to reflect both societal change and expectations.’

This article will suggest that the proposed package of reforms is unlikely to meet those objectives: the reform proposals will not benefit children; they do little to reflect social change; and they run contrary to what we know about public expectations. The proposed law of succession may even exacerbate conflict in families experiencing bereavement.

### The Scottish reform proposals

The Scottish government is currently consulting on a radical programme of reform,<sup>20</sup> having adopted the recommendations of the SLC’s 2009 Report.<sup>21</sup> One of the current authors has previously criticised the SLC’s apparently antagonistic treatment of children’s rights on the grounds that its underlying rationale is out of step with public attitudes towards inheritance (the fact that most parents want their children to inherit), with the reality of family life and with social policy objectives.<sup>22</sup> The Scottish government has substantially adopted those proposals, almost unaltered except for the fact that it has compounded the problems previously identified.<sup>23</sup>

The two elements of the proposals which will most affect children are the rules of intestacy and changes to legal rights.<sup>24</sup> These are examined separately but, unlike under the current law, they are now structurally linked and many of the consequences flowing from the intestacy rules apply equally to legal rights.

17 Ibid.

18 <http://lallandspeatworrier.blogspot.co.uk/2014/11/the-buggers-are-out-to-get-us.html>.

19 *One Scotland: the government’s programme for Scotland 2014–15* (Scottish Government, 2014), at para 11.

20 Scottish Government, *Consultation on the Law of Succession* (Scottish Government, 2015), available at: [www.gov.scot/Publications/2015/06/7518/downloads](http://www.gov.scot/Publications/2015/06/7518/downloads).

21 *Report on Succession*, above n 5.

22 D Reid, ‘From the Cradle to the Grave: Politics, Families and Inheritance Law’ (2008) 12 *Edinburgh LR* 391 and ‘Inheritance Rights of Children’ (2010) 14 *Edinburgh LR* 318.

23 In particular, the threshold sum, see below.

24 There are many other issues under consultation, including rights of cohabitants and stepchildren, and whether there should be a special regime for agricultural units. This article is limited to commenting on the parent–child implications of the proposals. It is worth noting, however, that the factors to be taken into account by courts in assessing the new discretionary

### **Reform of intestate succession**

The SLC recommended that children begin to share in a parent's estate on intestacy only if it is worth more than the 'threshold sum'. Where the deceased is survived by both spouse and children, the spouse would receive the first £300,000 of the estate (the threshold sum), and any balance would be shared equally between spouse and children.<sup>25</sup> It has been pointed out<sup>26</sup> that a threshold sum of £300,000 would result in the children of only the wealthiest 2% of Scots inheriting on the death of an intestate parent. The SLC accepted that this was the case,<sup>27</sup> and acknowledged that the question of children's inheritance rights was a controversial issue, particularly where the surviving spouse was not the parent of the deceased's children. One of the Commissioners at that time took the unusual step of dissenting from the recommendation, stating that £200,000 would be a more appropriate threshold.<sup>28</sup> In the end the SLC took the view that this was a political matter and was for Parliament to decide.<sup>29</sup> The Scottish Government's response is to consult on a range of values for the threshold sum in which the lowest figure is £335,000 and the highest £650,000.<sup>30</sup>

### **The threshold sum**

The rationale behind the threshold sum proposed by the SLC lies in the current law. The 1964 Act created a statutory right (referred to as 'prior rights') for the protection of widows on intestacy (the rhetoric at the time always envisages a widow, although the Act is gender neutral).<sup>31</sup> Prior rights have three elements: a housing right, a right to furnishings and a cash right, with the policy aim of allowing the spouse to remain in the furnished family home with a cash sum besides. However, while recognising that spouses required increased protection, the Act was careful to balance those needs with the claims of an intestate's children. The spouse's prior rights are, therefore, the first claim on an intestate estate, followed by the legal rights of spouse and children, after which any remaining balance goes to children under section 2 of the Act. Up until 2005, the spouse was likely to inherit all of a modest intestate estate and the children would benefit most in a larger estate. However, in 2005 that balance was significantly altered when the values of prior rights changed. The sums that could be claimed for prior rights had been raised fairly modestly since 1964, the levels being set by statutory instrument. However, in 2005 the housing element (the highest of the three entitlements) was increased by 250% from £130,000 to £300,000,<sup>32</sup> and then again in 2011 by a further 150% to £470,000.<sup>33</sup> Since the house will usually be the most valuable asset in the average estate, in most cases it will pass entirely to the spouse. Since 2005, therefore, Scottish children have been likely to inherit little or nothing from a married parent who is intestate, although it is doubtful if many members of the public are aware of this change.

The fundamental problem with prior rights is that they were conceived in an era dominated by a nuclear family model. Ensuring that the surviving spouse was able to continue living in the furnished family home was (and still is) a relatively uncontroversial step when the model family

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right proposed for cohabitants exclude consideration of the effect of any award on the deceased's children (unlike the current law): *Consultation on the Law of Succession*, above n 20, para 4.11.

25 *Report on Succession*, above n 5, at paras 2.6–2.15.

26 D Reid, 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (2008) 12 *Edinburgh LR* 391, at 413.

27 *Report on Succession*, above n 5, at para 2.14.

28 *Ibid*, at para 2.15, n 32.

29 *Ibid*, at para 2.14.

30 *Consultation on the Law of Succession*, above n 20, at paras 2.13–2.26.

31 Succession (Scotland) Act 1964, ss 8–9. Unlike many European jurisdictions, Scottish prior rights only arise on intestacy.

32 Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2005 (SSI 2005/252).

33 Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (SSI 2011/436).

is predicated on a stable parental relationship. Commonly inheritance to the next generation is postponed while the second parent is alive, but there is nevertheless a widespread expectation that children will inherit in due course.<sup>34</sup>

However, modern family life is much more complex: an increasing number of families are ‘reconstituted’ through second marriages, resulting in stepparent and stepsibling relationships. As a result, prior rights are increasingly likely to benefit a second spouse and, if s/he also dies intestate, his or her biological children, at the expense of any children from a first family. Scots succession law makes no attempt to address these social changes, one of the reasons stated both by the Scottish Government and the SLC for reform. And yet there has been steadfast resistance to the possibility of a different intestacy regime where the surviving spouse is not the parent of the deceased’s children on the ground that the law of intestacy must be simple.<sup>35</sup> It is questionable whether this is an adequate justification.

### ***Lies, damned lies and prior rights***

The current values of prior rights are highly relevant to the level of the threshold sum in the reform proposals, but the issue is bedevilled by discussion of house prices, housing market trends over time and the oft-cited value of the ‘substantial city house’ in Aberdeen which belonged to a law professor at the time the 1964 Act came into force.<sup>36</sup> Never have more statistics been available to public servants and yet they seem less than helpful in clarifying the issues.

There are many stated aims in this reform process, both by the SLC and the Scottish Government: the ‘primary purpose’ of intestate succession law is that it should be fair<sup>37</sup> (although it is not clear how fairness is to be assessed), but the rules should also be simple.<sup>38</sup> A repeated policy aim is that the surviving spouse should remain in the family home,<sup>39</sup> regardless of whether it is a first or second spouse or the length of the marriage, which in turn leads on to discussion of property values and the Scottish housing market.<sup>40</sup>

In 2005 the Scottish Executive had originally suggested a modest increase in the housing element of prior rights from £130,000 to £160,000, but this was increased to £300,000 on the recommendation of the Succession Committee of the Law Society of Scotland. The Order was passed with no parliamentary discussion, no consultation and no media attention. The second uprating in 2011 had limited consultation<sup>41</sup> on the government’s proposal to increase the housing element in line with the average Scottish house price between 2004 and 2009. This was calculated to represent an increase of 57%, hence they arrived at the figure of £470,000. This figure was said to capture over 95% of Scottish properties, and whilst acknowledging significant variation across Scotland, was deemed a suitable figure ‘so not as to [sic] prejudice against those surviving spouses living in [high-value] areas where the dwelling is in fact not “exceptional” by relative standards’.<sup>42</sup>

34 K Rowlingson and S McKay, ‘Attitudes to Inheritance in Britain’ (Joseph Rowntree Foundation, 2005), pp 7–11, available at: [www.jrf.org.uk/publications/attitudes-inheritance-britain](http://www.jrf.org.uk/publications/attitudes-inheritance-britain).

35 *Report on Succession*, above n 5, at paras 2.26–2.30; *Consultation on the Law of Succession*, above n 20, at para 2.21.

36 There appears to be some fondness for using Professor Meston’s rule of thumb for the housing element, namely that the figure used in the 1964 Act was approximately three times the value of his substantial Aberdeen house at that time: see *Consultation on the Law of Succession*, above n 20, at para 2.23; also *Report on Succession*, above n 5, at para 2.12, n 27.

37 *Report on Succession*, above n 5, at para 2.3; *Consultation on the Law of Succession*, above n 20, at paras 1.9 and 2.12.

38 *Report on Succession*, above n 5, at para 2.3; *Consultation on the Law of Succession*, above n 20, at para 2.10.

39 *Report on Succession*, above n 5, at paras 2.4 and 2.9; *Consultation on the Law of Succession*, above n 20, at para 2.9.

40 *Report on Succession*, above n 5, at paras 2.8–2.13.

41 Scottish Government, *Succession Law in Scotland: Review of Financial Limits of Prior Rights and Confirmation to Small Estates: A Consultation Paper* (Scottish Government, 2011), available at: [www.gov.scot/resource/doc/342116/0113827.pdf](http://www.gov.scot/resource/doc/342116/0113827.pdf).

42 *Ibid*, Annex A, p 2.

There are a number of flaws in these arguments. The fundamental flaw is to assume that the 2005 uprating was appropriate and to apply the percentage increase to an already inflated figure. Even if it is accepted that the housing market is taken to be a reliable indicator for succession rights, the consultation stated that the average price in 2004 was £103,943 and in 2009 £163,231, amounting to a 57% increase. The consultation paper uses the average increase between those years, but does not explain why a figure of three times the average house price is needed. There is also an assumption of perpetual growth in the housing market. However, according to the Office of National Statistics House Price Index, Scottish housing prices have not yet recovered from their peak in June 2008.<sup>43</sup> The limits for prior rights were, therefore, set without taking account of the economic downturn or the deflation of the housing market in Scotland. In addition, a fairly arbitrary period of time was chosen in which to measure the percentage increase. Assessing housing market trends twelve months later would have led to a significantly different result.

In its response to the consultation Consumer Focus Scotland, one of the few bodies which can claim to represent the interests of the public,<sup>44</sup> pointed out that most children were likely to receive nothing from a parent's estate even under the current limits and took the view that 'the limits should be increased only on the basis of evidence that the increase is in the wider public interest, taking public attitudes and expectations into account'.<sup>45</sup> The uprating went ahead nevertheless.

### **Unintended consequences**

In the current reform proposals the SLC chose the figure of £300,000 as the spouse's threshold sum using the current prior rights entitlement (at that time the housing right was £300,000) as the starting point. However, there is no real equivalence because all of the limitations which were built into prior rights no longer apply to the threshold sum. The housing element could only be claimed on a house, only on the net value of that house, and it was a maximum figure which would rarely be claimed in full.

If, for example, a couple jointly owned a property worth £300,000 with an outstanding mortgage debt of £100,000, the net value of the property would be £200,000. However, if they are joint owners (which would now be the usual practice for couples purchasing a house) the spouse already owns 50%, so of the current £470,000 maximum entitlement the spouse will only need to claim £100,000 as the deceased's net share. Since the most recent (2014) average annual house price in Scotland is £163,563<sup>46</sup> few co-owned homes will require anywhere close to the maximum prior rights entitlement in order for the spouse to acquire it. The SLC counters this argument by claiming that only 42% of homes are jointly owned in Scotland.<sup>47</sup> Aside from the fact that this figure does not include ownership by parties with different surnames, it is

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43 Office for National Statistics, *House Price Index June 2015*, available at: [www.ons.gov.uk/ons/rel/hpi/house-price-index/june-2015/stb-june-2015.html#tab=House-price-index-by-country](http://www.ons.gov.uk/ons/rel/hpi/house-price-index/june-2015/stb-june-2015.html#tab=House-price-index-by-country). See also a comparison with other parts of the UK: [www.ons.gov.uk/ons/rel/hpi/house-price-index/april-2014/info-hpi-comparison.html](http://www.ons.gov.uk/ons/rel/hpi/house-price-index/april-2014/info-hpi-comparison.html).

44 Evidence to the Scottish Government from Consumer Focus Scotland, May 2011, available at: [www.consumerfocus.org.uk/scotland/files/2011/05/CFS-response-to-law-of-succession-prior-rights-limits.pdf](http://www.consumerfocus.org.uk/scotland/files/2011/05/CFS-response-to-law-of-succession-prior-rights-limits.pdf).

45 *Ibid.*

46 There are considerable regional variations, for instance in Scotland's major cities the figures were: Aberdeen £213,717; Edinburgh £226,551; Glasgow £131,213 and Dundee £126,426. Registers of Scotland, *House Price Information: Annual Market Review* (Registers of Scotland, 2014), Table 1.

47 *Report on Succession*, above n 5, at para 2.10.

asserted on the basis of a very small sample, less than 0.01%.<sup>48</sup> A further limitation on prior rights is that the spouse must be ‘ordinarily resident’ in the house, thus excluding a spouse living apart from the deceased.

However, the new threshold sum has no such limitations. It is predicated on the value of housing but does not apply specifically to immovable property in the way that prior rights did. If it were to remain at £300,000, the result of applying that figure across the whole estate, regardless of its composition, will be the exclusion of an even greater number of children than those excluded by prior rights. The removal of the distinction between immovable and moveable property for all succession rights will, therefore, have this unintended consequence: on intestacy children will be further disadvantaged because the spouse’s threshold sum is no longer property-specific.

### **Comparison with English reforms**

It is instructive to compare the Scottish proposals with those recently enacted in the Inheritance and Trustees’ Powers Act 2014. The Law Commission took a similar stance to that of the SLC, prioritising the need to ensure that a surviving spouse could remain in the family home.<sup>49</sup> Initially the Law Commission linked the statutory legacy (currently £250,000) to house price inflation, but was persuaded that the Retail Price Index was a more reliable measure because the significant regional variation in house prices ‘would not reflect the reality in many areas’.<sup>50</sup> As in Scotland, an alternative regime for a second spouse was rejected as being too complex.<sup>51</sup>

The Bill was introduced under the House of Lords procedure for Law Commission Bills, which is designed for non-controversial measures. Indeed the Minister of State for Justice and Civil Liberties in the recent coalition government (Simon Hughes) specifically stated:<sup>52</sup> ‘This Bill is not controversial’. Lord McNally, introducing the Bill in the House of Lords, outlined that the rules of intestate succession aimed to ‘reflect the shape of contemporary society and replicate what most people think is an appropriate division between family members’.<sup>53</sup> He also claimed that the prioritisation of the surviving spouse was supported by empirical research,<sup>54</sup> although this may be a questionable interpretation of the results.<sup>55</sup> Examining the various legislative stages of the Bill, there was only one question acknowledging that there may be difficulties for first and second families.<sup>56</sup> This contrasts starkly with previous attempts by the Law Commission to improve the position of the spouse at the expense of children, which were considered ‘contentious’ and were ultimately rejected by Parliament.<sup>57</sup> Attitudes may have changed and a different generation of parliamentarians brings a different worldview to the issues. However, the British public may not have changed so very much.

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48 Ibid, at para 2.10, n 20. One hundred and forty property titles were sampled from a database of 1.5 million on the Land Register, which itself contains 58% of all Scottish properties: [www.ros.gov.uk/about-us/land-register-completion/land-register-completion-faqs](http://www.ros.gov.uk/about-us/land-register-completion/land-register-completion-faqs).

49 Law Commission, *Intestacy and Family Provision Claims on Death*, Law Com No 331 (TSO, 2011), at para 2.122.

50 Ibid, at para 2.123.

51 Ibid, at para 2.78.

52 *Hansard*, HC Public Bill Committee, 12 March 2014, available at: [www.publications.parliament.uk/pa/cm201314/cmpublic/inheritance/140312/am/140312s01.htm](http://www.publications.parliament.uk/pa/cm201314/cmpublic/inheritance/140312/am/140312s01.htm).

53 *Hansard*, *Lords Debates*, col GC337 (22 October 2013).

54 Ibid, col GC336.

55 A Humphrey et al, *Inheritance and the family: attitudes to will-making and intestacy* (National Centre for Social Research, 2010), see Executive Summary and tables 4.7 and 7.3. See also R Kerridge, ‘Intestate Succession in England and Wales’ in *Comparative Succession Law*, above n 4, at pp 337–340.

56 *Hansard*, *Lords Debates*, col GC354 (22 October 2013), by Lord Beecham.

57 For discussion of the Law Reform (Succession) Bill see *Hansard*, *Lords Debates*, vol 561, cols 502–511 (13 February 1995). For commentary see R Kerridge, above n 55, at pp 335–337.

### **Reform of legal rights**

As outlined above, the threshold sum is the single most significant element in the proposed reforms because it not only determines rights on intestacy, but it is also the baseline for the new 'legal share', the proposed replacement for legal rights which can be claimed on both intestate and testate estates. Originally in its discussion paper the SLC recommended the removal of a legal share for all but dependent children,<sup>58</sup> thereby removing the 'legal disability' in Scotland of not being able to disinherit your children.<sup>59</sup> By the time the subsequent report was published, the SLC had taken criticism on board and now presented two alternative options: first, that all children should receive a 'legal share' fixed at 25% of what they would be entitled to on intestacy (ie the intestacy proposals are used to calculate legal share);<sup>60</sup> and a second option reiterating their original position that only dependent children should be protected from disinheritance.<sup>61</sup>

The SLC and the consultation document treat intestacy and protection from disinheritance as two separate issues, but in reality they are intrinsically linked by means of the threshold sum. And while it is acknowledged that in virtually all intestate estates children will receive nothing when a married parent dies, it is not made clear that the same will be true for the proposed legal share in a testate estate. If the legal share is to be a percentage of a child's entitlement on intestacy and the proposals result in no entitlement on intestacy, then logically there will be no entitlement to legal share. This has not been made explicit, but it ought to be. In principle the fact that legal share can be claimed on the whole of an estate ought to be a more generous provision than legal rights were, hence the reason land campaigners have advocated for the change. If a parent is unmarried at the time of death that will be the case and children will equally share 25% of the estate. However, very few children of a married parent will receive anything as their legal share. The spouse is also to be given a legal share amounting to 25% of their entitlement on intestacy. Given that the spouse will take all of an intestate estate in most cases, this is a generous provision for a spouse who has not been provided for in the deceased's will.

### **Who is succession law for?**

This somewhat puzzling attitude to children's inheritance rights raises a wider question: who is influencing government policy in succession law? Agricultural and landed interests have already been identified by the Land Reform Review Group. However, there is arguably an even more influential group in Scottish society which is antagonistic towards legal rights: the Scottish legal profession. Lawyers are not identified as a lobby group, rather they are embedded in the process of law reform and consultation, forming the Advisory Group which shaped the initial SLC proposals and a majority voice in both SLC and government consultations. It is not unusual for the legal profession to be involved in and consulted on law reform projects. However they appear to have had an unusually strong influence on succession law. It was on the recommendation of the Succession Committee of the Law Society of Scotland that the 2005 large increase in prior rights came about. There are no committee minutes that can be consulted in order to understand the reasons why this might have been proposed. However, press comments by a committee member may provide a clue. He warned that the effect of prior rights were that '[i]n some cases the surviving spouse will get the house and a cash payment, but the

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58 Scottish Law Commission, *Discussion Paper on Succession*, Scot Law Com DP No 136 (TSO, 2007) at paras 3.78–3.100.

59 *Ibid*, at para 3.100.

60 *Report on Succession*, above n 5, at paras 3.16–3.38.

61 *Ibid*, at paras 3.56–3.70.

children will scoop the rest'. He goes on to give a concrete example, which perhaps illustrates the kind of family lawyers have in mind when they register opposition to legal rights:<sup>62</sup>

'People dying without making a will, who own their house, have a holiday home, a portfolio of shares worth half a million – the surviving spouse may get less than half of that and people just don't realise.'

Lawyers understand that the way to defeat legal rights under the current law is to increase the value of prior rights so that there is nothing left to claim, and this appears to be the policy the Scottish Government has adopted since 2005. The proposed level of the threshold sum fulfils the same function and may also have been influenced by the legal profession. The consultation is strongly influenced by 'informal pre-consultation dialogue with stakeholders'<sup>63</sup> but there is little transparency about who the stakeholders are other than the fact that they are 'members of the legal profession', a number of whom had concerns about the SLC Report.<sup>64</sup> It seems likely that the sums being consulted on have once again been elevated at the prompting of lawyers. Their motives may not be ignoble, their resistance based on concern for the surviving spouses of wealthy clients and the possibility of well-drafted wills being upset by the claims of children. However, the solution to the problem is not to distort the law of succession to suit the wealthiest families. It is surprising, therefore, that in its recent response to the current consultation the Law Society of Scotland has taken the view that the proposals may unduly affect children because the proposed threshold sum is too high, perhaps indicating a change of position.<sup>65</sup>

This begs a wider question – who should intestacy law be designed for? Although 67% of Scots have not made a will, those over 65 who are homeowners and of substantial means are the most likely to have done so.<sup>66</sup> Research undertaken in 2006 found that the most significant factors in determining whether someone had made a will were age, social class<sup>67</sup> and home ownership.<sup>68</sup>

Those who need the law of intestate succession are likely to have fewer assets to leave behind. Research conducted in 1990 found that the value of intestate estates was less than half the value of testate estates.<sup>69</sup> On the most recent available figures for 2013–14,<sup>70</sup> the average confirmed<sup>71</sup> estate in Scotland was £196,343<sup>72</sup> and between 2008 and 2014 averages have varied between £173,000 and £211,000. There is also considerable regional variation: the

62 G Rose, 'Warning on "outdated" Scots inheritance law', *The Scotsman*, 26 January 2014, available at: [www.scotsman.com/news/politics/top-stories/warning-on-outdated-scots-inheritance-law-1-3281647#ixzz3ITcQIjg7](http://www.scotsman.com/news/politics/top-stories/warning-on-outdated-scots-inheritance-law-1-3281647#ixzz3ITcQIjg7).

63 *Consultation on the Law of Succession*, above n 20, at p 3 (Ministerial Foreword). These stakeholders are referred to more than 20 times in the proposals.

64 This was stated by the Minister for Community Safety and Legal Affairs in answer to a Written Parliamentary Question, see 13 June 2012, Question S4W-07665, available at: [www.scottish.parliament.uk/S4\\_ChamberDesk/WA20120613.pdf](http://www.scottish.parliament.uk/S4_ChamberDesk/WA20120613.pdf). A recent response from the current Minister (Paul Wheelhouse) confirmed the same position.

65 The consultation response is available at: [www.lawsco.org.uk/media/593616/ts\\_succession\\_consultation.pdf](http://www.lawsco.org.uk/media/593616/ts_succession_consultation.pdf).

66 Scottish Consumer Council, *Wills and Awareness of Inheritance Rights in Scotland* (Scottish Consumer Council, 2006), available at: <http://webarchive.nationalarchives.gov.uk/20090724135150/http://scotcons.demonweb.co.uk/publications/reports/reports06/rp10wrep.pdf>.

67 Only one-fifth of respondents in socio-economic category DE (those in semi-skilled or unskilled jobs and those not in employment) said they had a will, compared to 58% of those in category AB (those in professional and managerial occupations), *ibid* at pp 6–7.

68 *Ibid*. 50% of home owners had a will compared to 15% of non-home owners.

69 H E Jones, *Succession Law*, Scottish Office Central Research Unit Papers (1990), p 15, Table 2.

70 Scottish Government, Civil Law Statistics in Scotland: Supplementary tables 2013–14, Table 6, available at: [www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsCJS](http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsCJS).

71 Confirmation is the process whereby an executor is appointed by the court to administer the estate, broadly equivalent to a grant of representation in England and Wales.

72 The average ordinary estate was £214,952 and the average small confirmed estate (where the value is £36,000 or less) was £24,100.

highest average is in Lothian and Borders at £256,568 and the lowest in Glasgow and Strathkelvin at £144,732.<sup>73</sup> However, even these figures are inflated: the real average across the population is much lower. The available statistics include only confirmed estates, which represent half of all deaths in Scotland; the other half are too small to require confirmation and are likely to be intestate.<sup>74</sup> The true average is probably less than £100,000.

As currently formulated this is intestate succession for the rich. Arguably it should principally be for those of modest means. Using the value of the average estate seems a more logical way to pursue that aim than the vagaries of the housing market.

Finally, it is worth examining again the item at the top of the policy agenda: ensuring that the spouse can remain in the family home regardless of all other considerations. This could be done by way of a life interest while the spouse is alive. However, it appears from discussions the authors have had that this is not an attractive option for the very reason that it attaches to a particular property. Many people as they grow older and children are independent want to 'downsize' and move to a smaller property. This is also true after the death of a spouse when the survivor may want a smaller house to maintain or simply a change of location. Surely the policy aim ought to be to ensure that the surviving spouse is comfortable rather than specifying that intestate succession must be able to cover the value of the current family home. The Scottish Government has reiterated the same policy aim, agreeing 'that there should be no change to this policy aim as it is most likely to reflect a deceased spouse or civil partner's wishes'.<sup>75</sup> This is questionable. As examined below, if the aim was really to reflect the wishes of the deceased, his or her children would be a very much higher priority.

### The modern family and inheritance

Enormous social changes have taken place in the UK since the law of succession was last conceived in Scotland in 1964. Family units are less predictable and less permanent than they were for previous generations, part of what Francis Fukuyama famously labelled the Great Disruption, evidenced by, among other things, 'the decline of families and kinship as a source of social cohesion'.<sup>76</sup> Freedom has been the watchword, whether it be freedom to end relationships and re-partner; freedom for women to be economically independent and make their own choices, including whether or not to bear children; or freedom to express a different sexual identity. The decline in traditional family values is thought to have been supplanted by a growth in self-seeking individualism and the quest for personal fulfilment.<sup>77</sup>

One manifestation of the emphasis on freedom and choice in family policy has been the liberalisation of the rules governing marriage and divorce. Couples can choose to marry and then to separate with relative ease and with little social disapproval. Post-separation and divorce the policy focus has turned to children of the relationship, or the vertical relationship: disputes over contact and residence; the regulation of child support; debates about the merits of shared parenting; and at times the trench warfare of women's groups and men's groups in asserting their parenting rights.<sup>78</sup> Patrick Parkinson suggests that it is time to recognise that the

73 Data provided to the authors by the Scottish Justice Analytical Unit.

74 *Report on Succession*, above n 5, at para 2.1, n 2.

75 *Consultation on the Law of Succession*, above n 20, at para 2.9.

76 F Fukuyama, *The Great Disruption: Human Nature and the Reconstitution of Social Order* (Free Press, 1999), at p 60.

77 For helpful summaries of this complex debate and its associated literature see J Eekelaar, 'Personal Obligations' in M Maclean (ed), *Family Law and Family Values* (Hart Publishing, 2005), at pp 11–16; J Eekelaar and M Maclean, 'Marriage and the Moral Bases of Personal Relationships' (2004) 31 *Journal of Law and Society* 510, at pp 510–515; L Jamieson, F Wasoff and R Simpson, 'Solo-Living, Demographic and Family Change: The Need to Know More about Men' (2009) 14(2) *Sociological Research Online* 5, at paras 1.3–1.9, available at: [www.socresonline.org.uk/14/2/5.html](http://www.socresonline.org.uk/14/2/5.html).

78 For an insightful analysis see P Parkinson, *Family Law and the Indissolubility of Parenthood* (Cambridge University Press, 2011), at pp 3–15.

lives of divorced parents remain intertwined in terms of parenting (and often financial) arrangements, and that ‘family law has changed to recognise the indissolubility of parenthood’.<sup>79</sup>

Succession law appears to be moving in the opposite direction, favouring horizontal relationships over descendants. From the perspective of individual choice it follows naturally that spouses be given priority as marriage is the ultimate relationship of choice. However, even if this viewpoint is accepted, it does not preclude ‘choosing’ to embrace fully the parent–child relationship, which may last considerably longer than the marriage and with ties of love and affection that are no less powerful for many people. The arguments made here defending the position of children in inheritance do not imply a lack of wholehearted support for recognising the important position of the spouse in the deceased’s family. However, it is by no means clear why the increased protection of the spouse has to be accompanied by an obliteration of the place of children in the inheritance family. Jane Lewis has commented that the prioritisation of spouse over children represents a trend towards ‘... the increasing separation of marriage and parenthood, which constitutes a more profound shift than the 1960s separation of sex and marriage’.<sup>80</sup>

In light of the supposed disintegration of traditional families, important work has been done by British scholars seeking to understand family behaviour, in particular the relationship between personal choice and personal responsibility. The picture that emerges has a degree of consistency<sup>81</sup> and within many, if not most, families, research studies have found implicit obligations of care and support<sup>82</sup> which operate in a reciprocal way: children attend to elderly parents; parents care for and support their children, even into adulthood. Indeed, it has been suggested that the very idea of family could be said to be ‘synonymous with the existence of a sense of obligation’.<sup>83</sup> For most functional families these self-imposed obligations of care exist both in life and in death. Inheritance rights symbolise the desire of most people to ensure that their children and their spouse, the parties to whom the deceased has been bound in a reciprocal obligation of care, are not cast out on death.

### **Attitudes to inheritance**

The law of intestate succession is often described in legal literature as attempting to replicate the ‘presumed will’ of the deceased, or ‘the law’s best guess as to what a typical deceased would have done had he or she taken the trouble to make a will’.<sup>84</sup> In the last 15 years three major studies have been carried out in England and Wales evaluating public attitudes towards inheritance, and one smaller study in Scotland.<sup>85</sup> These studies represent more than a ‘best

79 Ibid, p 15.

80 J Lewis, ‘The Changing Context for the Obligation to Care and to Earn’ in M Maclean (ed), *Family Law and Family Values* (Hart Publishing, 2005), at p 64.

81 See in particular J Finch and M Mason, *Negotiating Family Responsibilities* (Routledge, 1993); C Smart and B Neale, *Family Fragments?* (Polity Press, 1999); J Lewis, *The End of Marriage? Individualism and Intimate Relationships* (Edward Elgar, 2001); J Eekelaar and M Maclean, ‘Marriage and the Moral Bases of Personal Relationships’ (2004) 31 *Journal of Law and Society* 510.

82 See J Finch and J Mason, ‘Obligations of kinship in contemporary Britain: is there normative agreement?’ (1991) 42 *British Journal of Sociology* 345, at pp 356–359; J Finch and J Mason, *Negotiating Family Responsibilities* (Routledge, 1993), at pp 18–21.

83 J Eekelaar, ‘Personal Obligations’ in M Maclean (ed), *Family Law and Family Values* (Hart Publishing, 2005), at pp 11–16.

84 See K G C Reid, M J de Waal and R Zimmermann, ‘Intestate Succession in Historical and Comparative Perspective’ in *Comparative Succession Law*, above n 4, at p 446.

85 J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (Routledge, 2000); K Rowlingson and S McKay, *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), available at: [www.jrf.org.uk/publications/attitudes-inheritance-britain](http://www.jrf.org.uk/publications/attitudes-inheritance-britain); A Humphrey et al, above n 55; Scottish Executive, *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey* (Scottish Executive, 2005).

guess' and can provide some guidance for the framing of the law. All have found a consistent thread: most people want their children to inherit 'something' from their estate.

Finch and Mason undertook an inheritance project in the early 1990s with a view to discovering how inheritance was handled in ordinary families.<sup>86</sup> The researchers concentrated on personal relationships and the way in which individuals use inheritance as a means of confirming these relationships. In particular, inheritance was revealed as a means of active parenting whereby the paramount importance of the parent-child relationship was reconfirmed at the end of the parent's life.<sup>87</sup> This question was brought to the fore in situations where the deceased left both a first family and a second family. While it was clear that a spouse had to be provided for ahead of the children, first and second marriages were viewed as 'not quite equivalent' for inheritance purposes and the claims of the second spouse on the resources flowing from the second marriage were held to be somewhat 'ambiguous'.<sup>88</sup> Finch and Mason found that in complex families the parent-child relationship is both predictable and privileged, and this is manifested in their attitudes to inheritance.

When the law was recently reformed in England and Wales the Law Commission commissioned a large scale survey of public attitudes,<sup>89</sup> even if it did not fully implement the findings in the subsequent Inheritance and Trustees' Powers Act 2014.<sup>90</sup> This study had a specific focus on how different groups – in particular those with children from more than one relationship, stepparents and cohabitants – might vary in their attitudes towards defining family and kin for inheritance purposes.<sup>91</sup> Although there was considerable support for spouses, again a distinction was drawn between first and second spouses in cases where the deceased had children from the first marriage. The qualitative component of the study<sup>92</sup> suggested that the distinction was based on the view that a second spouse could not necessarily be trusted to provide for the deceased's children in every case and, consequently, in such instances children ought to inherit directly.<sup>93</sup> In the case of young children, entitlement was founded partly on their perceived need but participants also stressed the emotional relationship between parent and child, a factor that underpinned adult children's entitlement:<sup>94</sup>

'Showing one's love and doing the right thing, ultimately, underpins people's views on how property should be passed on.'

### **Scottish attitudes to inheritance**

Although legislators do not generally ask the public what their views are before legislating, there are good reasons for doing so in the case of succession. Inheritance touches the lives of every member of the public: we will all die, leaving behind family members; and we are all children of parents who will one day die. The SLC did conduct a survey in 2005<sup>95</sup> which suggested that there was strong support for a fixed share of a deceased's estate to pass to

86 For details of the methodology employed see *Passing On*, *ibid*, pp 183–188.

87 *Ibid*, at p 59.

88 *Ibid*, at p 37.

89 A Humphrey et al, above n 55; see also G Douglas et al, 'Enduring Love? Attitudes to Family and Inheritance Law in England and Wales' (2011) 38 *Journal of Law and Society* 245.

90 See R Kerridge, 'Intestate Succession in England and Wales' in *Comparative Succession Law*, above n 4, at pp 337–340.

91 A Humphrey et al, above n 55, at p 14.

92 For methodology see above n 55, pp 16–17 and pp 95–99.

93 *Ibid*, at p 84.

94 G Douglas et al, 'Enduring love: attitudes to family and inheritance law in England and Wales' (2011) 38 *Journal of Law and Society* 245, at p 247.

95 Scottish Executive, *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey* (Scottish Executive, 2005). 1008 people aged 16 and over were sampled. An omnibus survey was also conducted in 1986, summarised in Scottish Law Commission, *Intestate Succession and Legal Rights*, Consultative Memorandum No 69 (1986) App II.

children of any age, weaker where there was an existing will in favour of the spouse. However, the survey did not ask some important questions, such as whether respondents would feel differently if the deceased was poor or wealthy; or if the spouse was not the parent of the deceased's children.

Private lawyers are not known for their interest in empirical research, least of all in relation to succession, the blackest of black letter law. However, prior to embarking on reform of almost all other areas affecting families the government has conducted social policy research to inform that process. It is, therefore, surprising that no recent work has been done to inform the current proposals.

Given the dearth of information about public attitudes<sup>96</sup> and an impending reform process, one of the authors designed a research study to explore attitudes towards inheritance, particularly first family and second family dynamics and children's inheritance rights.<sup>97</sup> Thirty-seven individuals participated in the study,<sup>98</sup> 31 of whom took part in one of seven focus groups conducted in July and August 2014.<sup>99</sup> A further six individuals were interviewed individually. While the study does not claim to be representative of the general population, it is the first study exploring these issues with members of the Scottish public and as such it offers a more in-depth understanding of the attitudes expressed and the motivations behind them.

A biographical questionnaire distributed at the beginning of the focus groups revealed that seven participants lived in houses they valued as being worth less than the current Scottish average (£167,765),<sup>100</sup> while a further three reported that they were not home owners. In addition, six participants reported a household income of between £10,000 and £24,000, less than, or in line with, the Scottish median income of £24,000,<sup>101</sup> and four households reported family income in excess of £60,000.

The gender distribution of the participants was split evenly with 18 men and 19 women. The age range was also well balanced, although there was a deliberate focus on older participants (68% were over 50), and participants under thirty were excluded on the basis they were less likely to have personal experience of the central research issues, such as re-partnering, parenthood and property ownership. A high number (36) of the participants were parents, 30 of whom remained in a relationship with the other parent. Following efforts to boost the number of participants having experience of first and second family dynamics, the study was able to record the views of three people who had formed second families and four who had experience of being a stepchild.

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96 See, however, S O'Neill, *Wills and Awareness of Inheritance Rights in Scotland* (Scottish Consumer Council, 2006).

97 This research was conducted as part of the second author's doctoral thesis, of which the first author is a supervisor.

98 Recruitment was carried out via a form of snowball sampling. The author approached acquaintances who in turn recruited through their social and professional networks. Efforts were made to include people with different backgrounds and life experiences. Cognisant of grounded theory and the principles of theoretical sampling, three further waves of groups/interviewees were conducted after the initial round in response to particular patterns and associations that were emerging from the data. Data collection was halted when theoretical saturation was reached. All interviews were recorded and transcribed verbatim. The process of analysis is ongoing and coding is being used to generate concepts and theories. Further details are available from the authors.

99 While undertaking both quantitative and qualitative research would have been valuable, obvious constraints meant that only one option could be pursued. A combination of individual and group interviews was chosen as a recognised means of providing researchers with access to others' 'experiences and perceptions' (L Webley, 'Qualitative Approaches to Empirical Legal Research' in P Cane and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010), at p 936). As is conventional in qualitative research, the study aimed to produce findings that were 'representative in the sense of capturing the range or variation in a phenomenon [attitudes to succession], but not in the sense of allowing for the estimation of the distribution of the phenomenon in the population as a whole' (ibid, at p 934). As a useful point of comparison, the study conducted on behalf of the Law Commission for England and Wales comprised 30 interviews, although this was done in conjunction with quantitative work.

100 Registers of Scotland, Statistical News Release, July 2015, available at: [www.ros.gov.uk/\\_data/assets/pdf\\_file/0020/22277/RoS-Statistical-Release-Apr-Jun15-Final2107151.pdf](http://www.ros.gov.uk/_data/assets/pdf_file/0020/22277/RoS-Statistical-Release-Apr-Jun15-Final2107151.pdf).

101 *A National Statistics Publication for Scotland Poverty and Income Equality in Scotland* (2013/14), at p 3.

A selection of the themes that emerged from these conversations is presented below as having particular relevance to the current reform process.

### ***The parent–child relationship***

Finch and Mason found that children remain ‘the core thread of fixity’ in inheritance,<sup>102</sup> a view borne out in this study in that most participants view their children as the ‘end point’ in their inheritance narrative. Participants posited a variety of reasons to explain the privileged position of children: the longevity of the parent–child relationship; the love between parent and child; and the self-fulfilment which the relationship offers to the parent. The parent–child relationship was clearly viewed as a ‘no exit’<sup>103</sup> relationship, one which, despite its ups and downs, had to be viewed over the lifecycle and which could only be broken in the most exceptional cases. Crucially, this does not represent a burden for the parent, but rather is conceived as the realisation of what Douglas describes as the ‘project of the self to which people attach most significance during their lives’.<sup>104</sup> Parents drew obvious pleasure from envisaging leaving a token of their love and affection, a token which in some cases would also provide a financial cushion.

This stands in contrast to the discourse of the grasping adult child coveting the parent’s estate. Indeed, one of the perennially difficult topics to broach in any discussion of inheritance was the question of expectation. While dominant social norms precluded any participant from openly admitting to expecting an inheritance, many clearly did anticipate that, should their parents have any unused assets, they would be the most likely recipients. But the question of children’s expectations distracts from the central message that parents expect to be able to leave an inheritance for their children. This point was thrown into sharp relief in discussion of the state’s entitlement to a share of an elderly person’s assets to pay for care. In recounting her mother’s distress at being forced to sell the family home, Gillian observed – without disputing the state’s legitimate claim – that her mother’s expectation of leaving a modest bequest to her daughters had been thwarted:

‘but what upset my mum was the fact that, in their generation, as a working class family, it was that you worked hard and, you know, at the end of your days you had something to show for it and you gave it to your family.’

(Gillian, remarried, financial officer, Glasgow)<sup>105</sup>

The strength of parental desire to provide an inheritance was one of the most important findings of the study and arose from a sense of love and the self-imposed obligation that flows from that love. Thirty-six of the participants in the study were parents and all of them had provided, or planned to provide, for their children in their will. As one participant remarked:

‘I think it’s your responsibility as a parent, even if you are not in that child’s life, that when you leave, if you’ve got anything to leave, there should be something goes to them. I think you should . . . even if it was a fluke or an accident . . . it’s your responsibility . . . I would say so.’

(Lauren, divorced, hairdresser, Glasgow)

102 J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (Routledge, 2000), at p 59.

103 A L Alstott, *No Exit: What Parents Owe their Children and What Society Owes Parents* (Oxford University Press, 2004), at pp 51–52.

104 G Douglas et al, ‘Enduring love: attitudes to family and inheritance law in England and Wales’ (2011) 38 *Journal of Law and Society* 245, at p 247.

105 Fictitious names have been given to all participants in order to protect their identity.

Participants were willing to accept that there may be exceptional circumstances under which the parent–child bond could be destroyed, but without evidence of this the expectation was that right-thinking parents would leave a bequest for their children because, as one participant expressed it, ‘money . . . equates with love in some ways’.

### **First families versus second families**

The problem of the spouse versus the child in the context of succession arises most acutely in cases where the deceased has two families: one comprising a second spouse and any children of that relationship and one comprising children from a prior marriage. As Reid points out, the 1964 Act which moved Scotland from ‘a “dynastic” model of intestate succession . . . to one in which . . . the surviving spouse is allowed to take all or the bulk of the estate’<sup>106</sup> is largely accepted as long as the spouse can be relied upon to pass on the estate to the children of the deceased.<sup>107</sup> The data from this study suggests that most people want to see children recognised in some form, particularly where a first family/second family dynamic is involved.

The tension between first families and second families was explored in the research study by discussing a scenario in which the deceased bequeathed her entire estate to her second husband of three years at the expense of her adult children and, following his untimely death, the entire estate passed to his children on intestacy. A total of 29 participants were presented with the scenario, with 24 recorded as providing some commentary. Nineteen (79%) expressed an openly negative reaction to the outcome, either by voicing their opposition to what they perceived as a ‘wrong’ or ‘unfair’ outcome, or by stating that it was not something that they themselves would do.<sup>108</sup> This is not to say that all participants contested the testator’s right to act in such a way, simply that the outcome sat uncomfortably with them. Although the first part of the scenario relates to a testate scenario, the findings are also relevant to a discussion on intestacy. If there was discomfort about the outcome where the testator had chosen how to dispose of her estate, participants would be unlikely to consider the outcome any fairer where it was the result of intestacy provisions.

The reasons underpinning their views focused heavily on the potentially hurtful nature of the deceased’s actions and the unfairness of depriving children of a share in what their parents had created together. By disinheriting the children, the deceased had breached not only the social norm of providing for children, but the moral obligation she owed her first spouse to honour his contribution to their joint assets. One of the participants in the project identified closely with the research scenario, having formed a second relationship following the death of his first wife. He explained his objections as follows:

‘I tend to see half of what I have as being June’s. So that half if you like automatically goes to the children, rightfully. If you have your scenario, like there and it goes sideways and then to somebody else. I don’t think that’s right. That to me would be wrong.’

(Ron, re-partnered, retired engineer, Inverurie)

It is important to point out that participants did not consider second marriages to be qualitatively inferior to first marriages. In response to a second scenario designed to test this hypothesis, the participants were unperturbed by a woman’s estate passing entirely to her second husband at the expense of her adult siblings. However, they considered relationships

106 K G C Reid, ‘Intestate Succession in Scotland’ in *Comparative Succession Law*, above n 4, at p 395.

107 Ibid.

108 These findings mirror those recorded by other studies. In the most recent study only 15% of respondents favoured the spouse receiving everything where the deceased had adult children (A Humphrey et al, above n 55, at p 37). See also J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (Routledge, 2000), at p 37.

with children to be qualitatively different from those without, insofar as spouses who were also parents had obligations not just to each other but also to their respective children. The competing obligations did not require that the second spouse and the children be treated identically in terms of inheritance provision, only that each party be recognised and treated 'fairly'.

The discussions which took place around these topics (which are confirmed by other empirical studies of inheritance) suggest that while the reform proposals prioritise the spouse over all other family members, members of the public seek a more even-handed approach that would allow for both the spouse and the children to be recognised. It is suggested that the Scottish law reform proposals in this case lag behind the insights scholars have provided.

### ***Protection from disinheritance***

Attitudes towards the protection of children from disinheritance in testate succession were more nuanced. Participants still saw the children as entitled but had to balance this with the competing belief that the testator was best placed to decide how to dispose of his estate. However, while most supported testamentary freedom, analysis of their commentary suggests that commitment to that principle was not absolute.<sup>109</sup> This manifested itself in several ways: a readiness to make exceptions; a willingness to ignore testamentary provisions in certain cases; an acceptance of the need for a legal share; and the particular case of the limited testamentary freedom of parents. Only the last point will be explored below.

### ***Parenthood, testamentary freedom and the temporary nature of the spousal transfer***

While all of the parents in the study stated that they had or would include their children in their wills, this was by no means at the expense of the spouse, at least not where the spouse was the other parent of the participant's children. Although participants provided explanations such as the closeness of the spousal relationship in support of the spouse's claim, the belief that spouses owned their assets jointly emerged as the foundation on which their views rested. Married couples were perceived as having worked together to build up any assets the couple had and, for this reason, spouses rarely considered assets passing from one spouse to the other to constitute an inheritance. This confirms similar findings by other studies. Finch and Mason found that inter-spousal transfer is regarded as a separate process<sup>110</sup> whereby inheritance to the next generation is postponed while the second parent is alive, with an expectation that children will inherit in due course.<sup>111</sup> A study of Scottish wills found that an initial transfer of property between spouses was 'a temporary and transitional stage' with an expectation that it would ultimately flow to the next generation.<sup>112</sup> In this study, 10 of the 22 participants who had wills (and who remained in a relationship with the other parent) had to be prompted to remember that their will primarily benefited their spouse, not their children. Although this is an important point, it is nonetheless subordinate to the second point to emerge from the data; namely, parents who remain together view their will as a joint undertaking and not as an expression of their individualism.

This view manifested itself in two ways: first, in the language participants used to discuss their wills, a discourse replete with references to 'our will' and 'what we've done'; secondly, the

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109 The recent English study also revealed conflicting attitudes to testamentary freedom depending on the circumstances presented: A Humphrey et al, above n 55, at p 34.

110 J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (Routledge, 2000), at p 71.

111 K Rowlingson and S McKay, *Attitudes to Inheritance in Britain* (Joseph Rowntree Foundation, 2005), at pp 7-11.

112 M Munro, 'Housing wealth and inheritance' (1988) 17/4 *Journal of Social Policy* 417, at p 432.

common objective their wills shared. While participants generally provided for their spouses in the first instance, they intended their children (and in some cases their grandchildren) to be the final recipients of their estate. In other words, the spousal transfer was a temporary step preceding an eventual transfer of any remaining estate to the children. John explains his will in the following terms:

‘I mean when I go Lynne will get any cash that I have and the house also, obviously . . . It will all go to Lynne initially but there will be provision for our two daughters and then ultimately to the grandchildren. I can’t remember the detail . . . whether we’ve already made a formal arrangement for the grandchildren . . . but we did go to considerable lengths to make sure that as far as we understood things were relatively watertight and appropriate.’

(John, married, retired, Glasgow)

While participants’ testamentary intentions were often clear, how these intentions were to be implemented was more opaque. Eight of the participants reported that while their spouse was the first beneficiary, the estate would then pass to the children. Three of these eight believed they had binding written agreements with their spouses, while five simply stated that the property would pass first to their spouse and then to their children, without explaining how this would be achieved. A sense of unease fell over certain participants when they were pressed as to how their spouse was bound to implement their wishes, while others expressed surprise as they realised their agreements may not be legally enforceable after one of them had died: ‘Damn you! I’ll have to think about that now!’.

Other participants were fully aware that the agreement they had with their spouse was not legally enforceable. For some, this was inconsequential as they viewed their morally binding agreement to be no less unassailable than a legal one. Lauren, for example, explained that her mother would provide equally for her and her estranged brother because ‘that was my dad’s, her and my dad’s wishes . . . [and] she has to follow it through’. However, while several expressed their absolute trust that their spouse would implement their agreement, a handful did reveal themselves – or more accurately their mothers – to be more circumspect:

‘On the point of trusting your husband, my mum and dad have spent the last 15 years trying to make a will. She’s been married for 48 years and she still doesn’t trust my father enough not to run off with a floozy in the event of her death and spend her children’s and her grandchildren’s inheritance.’

(Malcolm, married, IT worker, Glasgow)

The data generated by discussion of shared testamentary intentions and the moral obligations that bind the surviving spouse to give effect to the agreed intentions of the couple, was amongst the most significant the study produced. The couples with children almost all appeared to accept that their own testamentary freedom was circumscribed in a unique way. While they were free to set out their wills as they (as a couple) saw fit, once the first spouse had died the last mutual agreement had, within reason, to be implemented. This suggests that for parents who remain in a relationship with the other parent of their child the moral obligation between spouses trumps the principle of testamentary freedom.

### ***Equality between children***

As discussed above, the interest of land reformers in succession law stems from a desire to end the concentration of private landownership in Scotland. It is also fascinating to see succession law, so often associated with maintaining privilege, being characterised as a vehicle for social

reform that could lead to 'land . . . [being] . . . distributed more equitably across society'.<sup>113</sup> Sharing an estate equally between the children and the spouse (through their respective legal shares) is a question of equity. While the participants in the study, with one notable exception, made no mention of land reform, fairness and equity were watchwords. All of the participants who were asked whether they would divide their estate equally between their children responded in the affirmative, although some suggested that appalling behaviour on the part of the child could change their view. A handful also reported that they could support distributing an estate to achieve greater equality of income, as opposed to distributing it in equal shares, but none appeared to have followed through with this. As one participant observed, 'I would have a big issue with putting something on paper that said someone was unequal to someone else'. Once again, the data echoes other studies: Finch and Mason found that 'the principle of equal treatment of children reigns supreme when it comes to the division of major assets,<sup>114</sup> while the recent study in England and Wales revealed a 'strong view that where children were to inherit, the estate should usually be divided equally between them'.<sup>115</sup> Maintaining a legal share for all children equally appears to be a point where the views of land reformers and public opinion converge.

## Conclusion

The Scottish Government recognises that there may be 'unintended consequences' in these reform proposals and that they 'will not work for everyone'.<sup>116</sup> It has been argued that succession law should be for ordinary families, for those of average wealth. Based on the findings of the studies outlined above, we would suggest that they also need to embody the social norms of ordinary people. The current raft of proposals is not in keeping with the views that emerge in study after study that children are a very significant, perhaps the most significant, recipient in the inheritance narratives of parents.

This begs the question of whether there is an alternative. If public attitudes are taken seriously it seems clear that children should almost always receive something from the estate of a parent. It need not be financially significant, but it may be emotionally and psychologically so. Intestate succession could operate on a sliding scale, with a percentage increase according to the size of the estate, thus ensuring that the spouse takes almost all of a modest estate, but children are generously treated in a larger one. This would be in keeping with the policy of the current law, although not since the changes that occurred in 2005. For instance, up to £100,000 just 1% or £1000 could be shared between any children; from £100,000 up to £250,000 (which takes the figures above the average estate) children could receive 5%; and thereafter rising to 25% or 30% for larger estates.

Another alternative would be to create a different, and less generous, regime where the spouse is not also the parent of the deceased's children. No attempt has been made to address this complex issue, although much could be learned from other jurisdictions which have a separate intestacy regime in those circumstances. For instance, in British Columbia there is a significantly smaller spousal share (half) where all the children of the deceased are not also children of the spouse;<sup>117</sup> likewise in the USA in the provisions of the Uniform Probate Code.<sup>118</sup> The desire for succession law to be simple is arguably of less importance than the goal of being fair and

113 A Wightman, *The Poor had No Lawyers: Who Owns Scotland (and How They Got It)* (Birlinn, 3rd edn, 2015), p 369.

114 J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (Routledge, 2000), at p 77.

115 A Humphrey et al, above n 55, at p 9.

116 *Consultation on the Law of Succession*, above n 20, at para 2.4.

117 Wills, Estates and Succession Act SBC 2009, ss 21(3) and (4).

118 Sections 2–102. In a recent comparative study at least seven jurisdictions are identified as having separate provisions, see R Kerridge, 'Intestate Succession in England and Wales' in *Comparative Succession Law*, above n 4, at p 340, n 95.

meeting expectations. Jurisdictions which have made a distinction where the deceased leaves a first family and a second family do not appear to have found it beyond the wit of lawmakers to draft a suitable law.

As for the question of disinheritance, despite the combined efforts of landed interests and lawyers, there is no evidence that the Scottish public would support removing the current protection for spouses or children of any age. It is certainly arguable that the legal share should not be structurally linked to the amounts that can be claimed on intestacy if a substantial threshold sum is to be maintained. The sliding scale suggested above could operate for the legal share of children, and could be revised in line with the figures for the average estate. Taking the latter as the baseline is a more logical approach than movements in the Scottish housing market.

Finally, there may be some merit in considering a discretionary scheme for the highly unusual circumstances in which a parent may have strong grounds for disinheriting a child or altering an equal allocation of legal share: for instance, where there has been abuse or criminal activity; where it would lead to the ruin of a business (as some farmers have argued); or where a particular child has particular needs. However, in general succession law should reflect the standard case and not the exception and should, therefore, seek to ensure that most children inherit something from the estate of most parents.



