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Where There's A Will...: Law and Emotion in Sibling Inheritance Disputes

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Chapter 3

Where There's a Will... : Law and Emotion in Sibling Inheritance Disputes

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I. INTRODUCTION

Succession law affects all families at an emotionally vulnerable time. As the family unit struggles to adapt to the loss of a key figure, estate distributions are a frequent source of conflict within common law systems, where the core value of testamentary freedom allows an individual to bequeath property on death as they see fit.¹ One of the most bitter examples occurs between adult children, following the death of their sole surviving parent.² While children are regarded as the 'natural' recipients of parental assets and the majority of wills reflect this,³ modern distributive patterns favour equal treatment- a socially constructed norm that emerged in the late twentieth century in Britain and other Western countries.⁴ As a result, disputes invariably occur when one child receives a larger share of the net financial estate than another or (in a more extreme scenario) inherits everything to the exclusion of his/her siblings; the allocation of specific items of property creates a similar effect where one child is

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¹ In sharp contrast to fixed inheritance rights in civil law jurisdictions- see for example, AL Marques, 'We Are Not Born Alone and We Do Not Die Alone: Protecting Intergenerational Solidarity and Refraining Cain-ism Through Forced Heirship' (2014) 4 *Oñati Socio-Legal Series*.

² In a typical two-parent family model, inheritance issues seldom arise on the death of the first parent since shared parental assets typically pass to the survivor; it is the death of the surviving parent that triggers the distribution of assets between children and the sort of estate contests that this chapter considers.

³ See for example, G Douglas, H Woodward, A Humphrey, L Mills and G Morrell, 'Enduring Love? Attitudes to Family and Inheritance Law in England and Wales' (2011) 38 *Journal of Law and Society* 245.

⁴ M Isaacs, 'Distributing Your Inheritance Fairly: Equity Theory and Will Power' (1998) *Eastern Psychological Association*, available at <http://scholarworks.rit.edu/article/191> (accessed January 2016). See also D Drake, 'The Will: Inheritance Distribution and Feuding Families' in M Mitchell (ed), *Remember Me: Constructing Immortality- Beliefs on Immortality, Life and Death* (Abingdon, Oxon, Routledge, 2007) 97 citing research findings by RJ Simon, ML Fellows and W Rau, 'Public Opinion About Property Distribution at Death' (1982) 5 *Marriage and Family Review* 25 and J Finch, L Hayes, J Masson, J Mason and L Wallis, *Wills, Inheritance and Families* (Oxford, Clarendon, 1996). The social norm that children should be treated equally is clearly time-based. For example, inheritance laws in most common law (and civil law) jurisdictions favoured sons over daughters, and also prioritised the eldest son until relatively recently (though gender preference can still be apparent when parents are allocating receive specific items of property- see Pt III). However, there is also a strong socio-cultural dimension, since not every modern society or culture sees equality as the norm; for example, gender inequalities still exist in parts of Africa and Latin America where males have preferential inheritance rights (see for example, CD Deere and M León, 'The Gender Asset Gap: Land in Latin America' (2003) 31 *World Development* 925), and also within certain systems of customary law (see for example, MF Radford, 'Inheritance Rights of Women Under Jewish and Islamic Law' (1999) 23 *Boston College International & Comparative Law Review* 135).

given the family home or other symbolic realty,⁵ or parental possessions imbued with monetary or sentimental worth. The financial consequences of an uneven distribution can be severe, with comparatively high levels of personal wealth among the ‘baby boomers’⁶ creating larger estates to pass on.⁷ However, the emotional consequences are just as serious; inheritance inequities (whether real or perceived) are a perfect breeding ground for acrimony and rancour which rupture family ties.

Of course emotions run through many legal disputes, and private law actions are no exception- even in the average tort, contract or property claim where the parties are transacting on an ‘arm’s length’ basis. However, when private law litigants are related to each other, the emotional dynamics take on added significance. Family law disputes are typified by emotion, and, despite a comparatively slow start,⁸ the area has assumed a more prominent role in law and emotions scholarship.⁹ Within the current collection, Professor Huntingdon’s chapter on domestic relations and the ‘affective family’¹⁰ makes another important contribution to this burgeoning literature. In contrast, succession law has been largely overlooked by law and emotions scholars, despite the centrality of the family in testamentary giving and the crucial role that emotions play in inheritance disputes- especially those involving adult children following the testate death of a parent.¹¹

Sibling relationships can be fraught; these tensions can carry on for years and often come to a head when a parent dies. A will, and especially one that gives children unequal shares of the estate, can trigger a lifetime of negative feelings and drive the disappointed

⁵ For example, a family farm or business; an old family vacation property.

⁶ See generally J Hills, F Bastagli, F Cowell, H Glennerster, E Karagiannaki and A McKnight, *Wealth in the UK: Distribution, Accumulation and Policy* (Oxford, OUP, 2013).

⁷ This is still an important fiscal event, despite well-documented changes in the intergenerational transfer of wealth. A significant part occurs while parents are still alive and providing ongoing financial support to adult children (for example, paying university fees, financing a business venture and assisting with house purchases), while increased longevity also means that baby boomers are consuming more of their own capital post-retirement; both mean fewer assets to pass on- see JH Langbein, ‘The Twentieth Century Revolution in Family Wealth’ (1988) 86 *Michigan Law Review* 722 and C Sappideen, ‘Families and Intergenerational Transfers: Changing the Old Order?’ (2008) 31 *University of New South Wales Law Journal* 738.

⁸ See K Abrams, ‘Barriers and Boundaries: Exploring Emotion in the Law of the Family’ (2009) 16 *Virginia Journal of Social Policy & the Law* 301, 307.

⁹ See the various sources cited in Abrams (n 8), as well as S Moldonado, ‘Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce’ (2008) 43 *Wake Forest Law Review* 441, C Huntingdon, ‘Repairing Family Law’ (2008) 57 *Duke Law Journal* 1245 and C Huntingdon, ‘Family Law’ (2010) 59 *Emory Law Journal* 10.

¹⁰ See Huntingdon, Ch 2.

¹¹ While intestacy distributions are also based on established kinship networks, the emphasis here is on will-making because the will-maker’s freedom of choice and how this is perceived by his/her survivors makes it more amenable to a law and emotions analysis than a legislatively mandated universal scheme.

sibling to litigation.¹² As we shall see, a number of features make these particular contests so inherently emotional: the fact that they centre on the two most formative and enduring family relationships (parent-child, and sibling-sibling), both coloured by years of history and personal interactions; the symbolic qualities of inherited wealth, along with attachments to specific items of property; parental intent, and the significance of the will as a conscious expression of someone's last wishes; and the personal, familial and social connotations of an uneven inheritance.

This chapter unpacks the underlying emotional narrative, identifying the complex sentiments that create and fuel inheritance disputes between adult siblings. Drawing primarily on a mix of legal, psychological and sociological literature which attributes many of these to unresolved childhood issues, it argues that estate conflicts have a distinctive contextual backdrop which exacerbates these negative feelings and ups the emotional ante even further. In keeping with the overall themes of the collection, the chapter goes on to look at how these emotions are reflected in legal processes and by legal actors. For example, while Anglo-American jurisprudence suggests a more nuanced emotional response to estate contests than in other areas of legal decision-making, the fact that judges often intervene when presented with an uneven estate distribution can indirectly reveal what they feel about sibling (or more usually) parental behaviour here. The chapter concludes by considering how the emotional fall-out could be lessened, by will-makers, lawyers and the legal system being more cognisant of the underlying psychological and emotional dynamics.

II. DEATH AND DISCORD: THE PERFECT EMOTIONAL STORM

Emotions are intrinsic to family relationships. While siblings experience a range of emotions- both positive and negative- throughout their collective lives, the death of a parent takes them into uncharted territory. Kennedy describes parental death as a 'shattering experience', which floods individuals with 'powerful forces' as the 'boundaries of [their] world are torn away'.¹³ In many ways, this experience is not unique to siblings; the loss of any loved one is a traumatic experience as intimate bonds and personal relationships are irrevocably altered by

¹² The following contextual caveat is important, and will be revisited later in the chapter: leaving an estate unevenly does not actually mean that the parent favours one child over another; the underlying reasons vary (see pp 12-13), even if the excluded or marginalised child is likely to interpret the parent's actions in a negative way.

¹³ A Kennedy, *Losing a Parent: Passage to a New Way of Living* (New York, HarperOne, 1991) 2.

death's seismic forces.¹⁴ Yet, in some respects, it is more pronounced. Adult children, regardless of their age, feel anchorless and cast adrift as they mourn the loss of a life-long relationship; the fact that death is in the natural order of things is irrelevant, as they confront an altered reality without the parent's comforting, constant presence.¹⁵ Parental death also precipitates unprecedented change,¹⁶ forcing siblings to navigate uncharted relational territory while finding a new emotional equilibrium- both as individuals and as a group.¹⁷ Strong sibling bonds can be a source of comfort during this time, with Milvesky highlighting their compensatory value following the loss of a parent.¹⁸ Yet, while we instinctively assume that death brings families together, the reality can be very different.

Death produces a range of complex and disorientating emotions, which manifest themselves through the grieving process.¹⁹ For example, Lindemann famously identified grief as a syndrome comprising five key elements: somatic disturbance, preoccupation with the image of the deceased, guilt, hostility and disorganised behaviour.²⁰ In similar vein, Bowlby and others have analysed it as involving numbness and disbelief, anxiety and anger, depression and despair.²¹ Despite subtle variances in the overall mode of expression, psychologists concede that anger and aggression are common features of the grieving process. The inevitable and inescapable sense of change for those who are left behind results in post-mortem stress, a sense of 'sheer pressure [which] bereavement places upon the body

¹⁴ See for instance, K Charmaz, *The Social Reality of Death: Death in Contemporary America* (Reading, Massachusetts, Addison-Wesley Publishing Co, 1980) and F Walsh and M McGoldrick (eds), *Living beyond Loss: Death in the Family* (New York, WW Norton and Co, 1991).

¹⁵ See generally, D Umberson, *Death of a Parent: Transition to a New Adult Identity* (Cambridge, CUP, 2006) and R Abrams, *When Parents Die: Learning to Live with the Loss of a Parent* (Abingdon, Oxon, Routledge, 3rd edn, 2012).

¹⁶ Natural realignments and adjustments are inevitable, adding to the sense of posthumous disarray- CI Murray, K Toth and S Clinkenbeard, 'Death, Dying and Grief in Families' in P McKenry and S Price (eds), *Families and Change: Coping with Stressful Life Events* (Thousand Oaks, CA, Sage, 3rd edn, 2005) 75.

¹⁷ The death of a parent also causes the children to confront their own mortality, since (assuming a natural order of events) the children are now next-in-line to die. This can trigger negative emotions, as well as worries about the future and financial security which were not present before.

¹⁸ A Milvesky, *Sibling Relationship in Childhood and Adolescence: Predictors and Outcomes* (New York, Columbia University Press, 2011).

¹⁹ E Lindemann, 'Symptomatology and Management of Acute Grief' (1944) 101 *American Journal of Psychiatry* 797; J Bowlby, 'The Process of Mourning' (1961) 42 *International Journal of Psycho-Analysis* 331; J Bowlby and C Parkes, 'Separation and Loss within the Family' in CJ Antony and C Koupernick (eds), *The Child and his Family* (London, Wiley, 1970) 197; and CM Parkes, *Bereavement: Studies of Grief in Adult Life* (London, Tavistock Press, 1972).

²⁰ *Ibid.*

²¹ Bowlby and Parkes (n 19). See also J Archer, *The Nature of Grief: the Evolution and Psychology of Reactions to Loss* (London, Routledge, 1999) 24-26 and A Levy, *The Orphaned Adult* (Reading, Massachusetts, Perseus Books, 1999) 23.

and mind as an integrated whole'.²² Past grievances often resurface following the death of a loved one. Emotions are running high; and where families are prone to conflict, bereavement acts as a 'stress amplifier',²³ putting additional strain on already fragile relationships.²⁴ However, sibling dynamics take this to another level, as unresolved childhood issues come to the fore.

Sibling bonds can last for a lifetime, making this one of the most enduring relationships that individuals can develop and foster.²⁵ Of course, few families conform to a utopian behavioural ideal, and siblings are no different. While part of a family unit, they are also unique individuals with distinct character traits, making them just as prone to personality clashes as other interpersonal relationships. At a more basic level, Brody notes that sibling relationships are 'rarely characterized by very high levels of support along with low levels of rivalry and aggression';²⁶ conflict is much more common. Sibling rivalry is one of the oldest emotional experiences within families, and its destructive and divisive nature has been well-documented throughout human history.²⁷ Underpinned by jealous struggles for parental attention from an early age, sibling rivalry exudes a range of feelings such as anger, anxiety, distress, resentment and worthlessness- though jealousy often predominates.²⁸ Jealousy itself is a self-critical and complex social emotion, invariably triggered by a third party threat (whether real or apparent) to a key relationship.²⁹ In the sibling context, it represents 'the most powerful jealousy of youth' as the presence of a sibling rival threatens the parent-child dynamic that is the 'most important and formative relationship of a young child's early

²² DJ Davies, *Death, Ritual and Belief* (London, Continuum, 2nd edn, 2002) 59.

²³ Levy (n 21) 90. See also B Raphael and M Dobson, 'Bereavement' in JH Harvey and ED Miller (eds), *Loss and Trauma: General and Close Relationship Perspectives* (Philadelphia, Brunner-Routledge, 2000) 50-53.

²⁴ ES Traylor, B Hayslip, PL Kaminski and C York, 'Relationships between Grief and Family System Characteristics' (2003) 27 *Death Studies* 575. American drama film *August: Osage County* (Smokehouse Pictures, 2013), which reunites three siblings, their acerbic mother and the wider family circle at the father's funeral, illustrates this perfectly.

²⁵ Milvesky (n18) ix citing VG Cicirelli, 'Sibling Influence Throughout the Lifespan' in ME Lamb and B Sutton-Smith (eds), *Sibling Relationships: Their Nature and Significance Across the Lifespan* (New York, Lawrence Erlbaum Associates, 1982) 267-284.

²⁶ GH Brody, 'Sibling Relationship Quality: Its Causes and Consequences' (1998) 49 *Annual Review of Psychology* 1, 19.

²⁷ For example, it is a recurring theme throughout the Bible- Cain's slaying of his brother Abel in the Book of Genesis (Genesis 4: 1-16) and the parable of the prodigal son in the Gospel of Luke (Luke 15:11-32). More recent examples on this side of the Atlantic include the infamous spat between Noel and Liam Gallagher which prompted the 2009 split of Britpop band Oasis, and the 2010 Labour Party leadership contest between David and Ed Miliband when the younger sibling stood against and ultimately defeated his older brother.

²⁸ For a psychological analysis, see D Rowe, *My Dearest Enemy, My Dangerous Friend: Making and Breaking Sibling Bonds* (Hove, Routledge, 2007) and J Safer, *Cain's Legacy: Liberating Siblings from a Lifetime of Rage, Shame, Secrecy and Regret* (New York, Basic Books, 2012).

²⁹ See generally P Salovey (ed), *The Psychology of Jealousy and Envy* (New York, The Guilford Press, 1992).

life'.³⁰ Parents 'cannot attend and respond to...[all of their] children's needs at all times'³¹, and siblings invariably compete with each other for parental attention from an early age.³² As a result, undercurrents of sibling rivalry probably infuse everyday transactions between brothers and sisters, especially when growing up together in the same household. Yet sometimes sibling strife develops into something more, straining relationships or causing them to break down completely, and generating patterns of behaviour which siblings replicate at key stages throughout their adult lives.³³

The death of a parent is an obvious trigger, and as siblings come together- perhaps returning to their old family home, itself a 'deeply symbolic repository of memories and grievances'³⁴- latent traits re-emerge. In the initial post-mortem period, preoccupation with funeral arrangements and fulfilling basic social and legal requirements (obtaining a death certificate, liaising with the funeral director, receiving visitors) can prevent simmering tensions from spilling over.³⁵ However, discovering the contents of a dead parent's will often puts 'the final nail in the coffin of...a moribund sibling connection'³⁶ as unequal (or ostensibly unjust) distributions reignite 'old issues of sibling rivalry and dominance'.³⁷ The value of specific bequests and objects is not always important; it is the fact that the chosen estate distribution determines 'each beneficiary's relative importance and position in the family'³⁸ and, with adult children, is perceived as a measure of parental love and approval-

³⁰ BL Volling, NL McElwain and AL Miller, 'Emotion Regulation in Context: The Jealously Complex Between Young Siblings and Its Relations with Child and Family Characteristics' (2002) 73 *Child Development* 581, 583.

³¹ Volling (n 30) 584. See also LA Keister, 'Sharing the Wealth: The Effect of Siblings on Adults' Wealth Ownership' (2003) 40 *Demography* 521, 522 ('[p]arents have finite material and non-material resources, and additional siblings dilute the amount that can be devoted to each child').

³² Studies suggest that infants can exhibit jealousy from as early as six months, if maternal attention is channelled elsewhere- see S Hart and H Carrington, 'Jealousy in Six-Month-Old Infants' (2002) 3 *Infancy* 395.

³³ '[P]roblems with siblings are childhood experiences in contemporary guise. Rivalry, competition, and anxiety about [their] place in [their] parents' affections underlie these problems, breeding rancor that haunts siblings all their lives and recurs in each phase of adulthood- work, marriage, parenthood, caring for aging parents, and eventually, settling that perpetual minefield, the estate'- Safer (n 28) 3.

³⁴ Safer (n 28) 181.

³⁵ This is not always the case. For example, disputes over funeral arrangements can be an immediate source of contention- see H Conway and J Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34 *University of New South Wales Law Journal* 860.

³⁶ Safer (n 28) 157.

³⁷ J Folberg, 'Mediating Family Property and Estate Conflicts' (2009) 23 *Probate & Property* 8, 9.

³⁸ PM Accettura, *Blood & Money: Why Families Fight Over Inheritance and What To Do About It* (Michigan, Collinwood Press, 2011) 2. See also JG McMullen, 'Keeping Peace in the Family While You Are Resting in Peace' (2006) 8 *Marquette Elder's Advisor* 61, 81 (an inheritance 'may represent the approval or love of the benefactor-relative').

regardless of the will-maker's underlying intent.³⁹ As Safer points out, notions of parental favouritism, and who was loved more, are reinforced and perpetuated here:

Money = Love is a very old equation, one that is played out with a vengeance in siblings' fights over the terms of their parents' will and the distributions of their possessions. The compulsion to demonstrate, in court if necessary, that you really were your parents' favourite (or to compensate for the fact that you were not) underlies these battles as much as greed does, and blinds people to the consequences, which will almost always include the permanent loss of their siblings' goodwill.⁴⁰

As far as the children are concerned, any disparities in the estate distribution marks one child out as a 'loser' in what has been described as the 'parental-love competition'⁴¹, with seemingly minor issues about the distribution of parental effects becoming symbolic battlefields for resolving claims on parental affection.⁴² In many ways, estate contests are as much about deflected anger towards the dead parent as towards the other siblings,⁴³ as parental resentments resurface and are reconstituted by patterns of wealth distribution. An unequal inheritance disrupts (and in more extreme examples, destroys) what the disappointed beneficiary thought was a secure attachment relationship with their parent, developed and nurtured from childhood. The emotional needs of the child can also transcend the death of the parent, as the former craves parental validation which will now never materialise because the estate has been divided unequally, and the marginalised or excluded child has apparently been identified as less 'worthy' than their siblings.

What we have here is a toxic mix of negative emotions. Some of these (anger, hostility, sadness) are already lurking in the background as natural by-products of the grieving process; in the event of an uneven estate distribution, these are amplified and joined by other harmful sentiments (jealousy, hurt, bitterness, disappointment and rejection, to list a few). Sibling inheritance disputes are 'so emotionally charged that they can easily escalate'.⁴⁴ Brothers and sisters refuse to back down in their quest to negate the emotional consequences

³⁹ Again, there are positive reasons why parents divide property unevenly between their children- see pp 12-13.

⁴⁰ Safer (n 28) 180-181.

⁴¹ Safer (n 28) 51.

⁴² Levy (n 21) 110.

⁴³ 'Receiving less preferential treatment is particularly significant to a child because of the potent implications it carries...Children's recognition of the inequality in their relationships with their parents is hypothesized to occasion emotional dysregulation, leading to anger that is displaced onto the favored brother or sister' - Brody (n 26) 12.

⁴⁴ T Mayersak, 'Examining the Use of Arbitration and Dealing with Decedent's Wishes in Wills, Trusts and Estates' (2010) 12 *European Journal of Law Reform* 404, 406.

of an uneven estate distribution, and prove themselves as an equally loved and equally worthy parental heir. The underlying feelings are not only complex and all-consuming; they can also cause the disappointed sibling to engage in seemingly irrational behaviour, with disastrous consequences.⁴⁵ Destroying or dissipating estate property so that no-one gets anything (what Accettura describes as the ‘scorched earth’ approach⁴⁶) is a classic example- and in February 2013, one brother took this to extremes when he destroyed a £300,000 family home in Cardiff, Wales with a sledgehammer after falling out with his siblings following a seven-year row over inheritance.⁴⁷ Of course, exorcising the ghosts of sibling rivalry and parental favouritism does not usually have such extreme consequences. However, one brother or sister’s relentless march towards litigation is not just something which impacts on siblings; as members of an ‘interactive, independent network in which behaviour in one individual or subsystem affects the others’,⁴⁸ a ripple effect spreads across the entire family system. Other relatives are drawn into the estate contest (even if they do not want to be involved), creating an existential emotional crisis which threatens broader family harmony and stability.

III. EMOTIONAL ATTACHMENTS TO PROPERTY

Inherited wealth is highly symbolic for siblings, and not just because it connotes parental love and approval. Different types of property are imbued with meaning, and generate strong emotional attachments, as well as creating their own distinct inheritance expectations.

⁴⁵ The fact that emotions can override rational thought and cause the parties to do things that appear ‘nonsensical and counterintuitive’ has been documented in the family law context- J Weinstein and R Weinstein, “‘I Know Better Than That’: The Role of Emotions and the Brain in Family Law Disputes’ (2005) 7 *Journal of Law & Family Studies* 351, 352 (discussing child custody disputes in particular). See also PH Huang, ‘Reasons Within Passions: Emotions and Intentions in Property Rights Bargaining’ (2000) 79 *Oregon Law Review* 435, 439 (‘emotions such as fear and anger disrupt normal rational thought and reasoning capabilities’) and G Lowenstein, ‘Out of Control: Visceral Influences on Behavior’ (1996) 65 *Organizational Behavior & Human Decision Processes* 272.

⁴⁶ Accettura (n 38) 3.

⁴⁷ Tony McGuire had been living in the family home (originally owned by his father) with his wife and six children; however, his father’s will left the property to Tony and his two other siblings who were trying to evict their brother before he took a sledgehammer to the property and reduced most of it to rubble. Mr McGuire was given a two year suspended sentence for what the court described as an ‘appalling act of spite’- ‘Sledgehammer House Attack: Tony McGuire Given Suspended Sentence’, *BBC News Online*, 26 June 2013, located at <http://www.bbc.co.uk/news/uk-wales-south-east-wales-23059344> (accessed January 2016). Ironically, it was equal division of the parental estate that caused the problem here.

⁴⁸ Brody (n 26) 2.

Most wills focus on real estate and financial assets, as high value items. The family home is a good example;⁴⁹ since the property is not divisible in a practical sense, and adult children who have long since moved away are unlikely to return, a parent's will might direct that the home be sold and the proceeds divided equally between the children. Although consistent with social norms around the post-mortem allocation of wealth,⁵⁰ such directions can be problematic for the child who is not keen on selling because of their own emotional attachment to the property⁵¹- including the sense of both individual and family identity tied up in the home.⁵² In the context of the present chapter, significant issues can arise where the parent decides to leave the family home to a particular child (often one who resided there with the parent, up until the latter's death);⁵³ this removes a valuable legacy from the parent's estate, and can generate anger, hurt and resentment on the part of the other siblings, regardless of the parent's intent. Family farms are also valuable items of real property which generate strong emotional attachments, yet attract very different inheritance perceptions. Here it is not simply a question of whether to divide the land or leave it intact;⁵⁴ farms tends to be passed down through generations,⁵⁵ traditionally to (eldest) sons.⁵⁶ Social convention allows equality to be sacrificed here, but can still generate bitterness and ill-feeling on the part of the non-farming siblings.⁵⁷ Moving on to financial resources, money and cash convertible assets such as stocks and shares can be divided in whatever way a parent sees fit- more so than any

⁴⁹ Increasing rates of home ownership from the latter half of the twentieth century onwards mean that home ownership 'is no longer for the relatively affluent' but is 'now normal experience for "ordinary families" who have not accumulated land or vast sums of wealth through the generations- J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (London, Routledge, 2000) 3.

⁵⁰ And the law's mantra to 'sell and divide' as the typical default stance where an asset of material value cannot be apportioned.

⁵¹ Affective connections to the home have been well-documented- see for example, H Easthope, 'A Place Called Home' (2004) 21 *Housing, Theory and Society* 128 and DB Barros, 'Home as a Legal Concept' (2006) 46 *Santa Clara Law Review* 255. For a more critical approach, see SM Stern, 'Residential Protectionism and the Legal Mythology of Home' (2009) 107 *Michigan Law Review* 1093.

⁵² Similar issues can arise where the home is simply bequeathed to children jointly, and one person is not keen to sell (because of the emotional attachments just mentioned) yet the other siblings are. Constructs of fairness and equality can still create problems here- a situation which also frequently arises with old family cottages and vacation properties which parents (acting with the noblest of intentions) often leave to their children as shared owners. All too often, the result is discord when one sibling insists on keeping the property to recreate their own childhood idylls and another resents having their inheritance tied up in a place which they now only value as a cash asset- see SJ Hollander, DS Fry and R Hollander, *Saving the Family Cottage: A Guide to Succession Planning for Your Cottage, Cabin, Camp or Vacation Home* (Chicago, Nolo, 2013).

⁵³ The same child may have cared for ageing parents, and have no home of their own.

⁵⁴ Though a farm may need to stay intact to remain a profitable enterprise- CS Olsen and T Osborn, 'Inheritance: "A Tale of Two Perceptions"' (2006) 1 *Online Journal of Rural Research & Policy*.

⁵⁵ The emphasis here is on 'intergenerational family farm continuity'- Olsen and Osborn (n 54) 6.

⁵⁶ When it comes to inheriting farmland, a 'gender bias...seems far more frequent and acceptable than is the case for the distribution of money'- JJ Goodnow and JA Lawrence, 'Inheritance Norms for Distributions of Money, Land, and Things in Families' (2010) 1 *Family Science* 73, 76.

⁵⁷ Even with the compensatory gift of a cash settlement, or a plot of land on the farm so they can build their own home.

of the other types of property being looked at here. Yet, siblings will still contest any resultant economic disparity, not because of particularly strong emotional attachments to the money itself,⁵⁸ but because of what the unequal distribution symbolises and the feelings that this generates.⁵⁹

Personal possessions, in contrast, are often omitted from the distributive contents of the a dead parent's will;⁶⁰ and while real estate and money are more likely to trigger the sort of litigation discussed later in this chapter, disputes over who gets items of personal property (for example, a mother's wedding ring or a father's watch; photo albums; lovingly assembled collections of books, music or china; family mementoes such as Christmas ornaments and holiday souvenirs) can become just as embittered, even if they are less likely to end up in court. Any process of allocation is necessarily informal and sibling-led, but suffers from two main drawbacks. First, as items accumulated over a parent's lifetime (and sometimes across generations of the same family), they are imbued with personal meaning and have a sentimental value unrelated to their economic worth.⁶¹ Because they symbolise the dead parent, personal possessions engender exceptionally high levels of emotional attachment;⁶² on the death of a parent, these attachments are assumed and perpetuated by the child who claims it for him/herself as an ongoing narrative of association with the deceased.⁶³ Second, the reality is that certain things (for example, a favourite painting, specific pieces of jewellery) cannot be divided, fuelling the sense of unfairness.⁶⁴ Stum highlights '[o]ngoing rivalries' and issues of 'power and control' among siblings as influencing the transfer of

⁵⁸ These would differ significantly from the type of affective connections a son or daughter had to, for example, their old family home or a dead parent's personal possessions.

⁵⁹ Though Goodnow and Lawrence suggest that bequest of money have 'personal meanings' attached and are 'often seen as a sign of relationship quality'- Goodnow and Lawrence (n 56) 75.

⁶⁰ Finch and Mason (n 49) 145 suggest that many lawyers discourage their clients from distributing items of personal property. And even where a will contains a direction to divide personal property evenly among the deceased's children, Stum argues that 'such vague and impossible directions provide little guidance for surviving family members'- MS Stum, 'Families and Inheritance Decisions: Examining Non-Titled Property Transfers' (2000) 21 *Journal of Family and Economic Issues* 177, 179.

⁶¹ '[M]undane functional goods that were not necessarily singular or cherished can serve as potent material footprints of the departed'- D Turley and S O'Donohoe, 'The Sadness of Lives and the Comfort of Things' (2012) 28 *Journal of Marketing Management* 1331, 1342.

⁶² For a detailed analysis see Stum (n 60) and Finch and Mason (n 49) ch 6. The latter note that the 'symbolic value of personal gifts and possessions is very high' (ibid, 140) and that 'keepsakes' and other reminders have a special status because the object '*carries the memory* of the person who owned it but who has now died' (ibid, 142).

⁶³ Such objects 'symbolize identities which may become the objects of reminiscences by survivors' (DR Unruh, 'Death and Personal History: Strategies of Identity Preservation' (1983) 30 *Social Problems* 340, 344) and often 'continue to be thought of and named as belonging to former owners even though they are now worn by, used or in the possession of other people' (M Gibson, 'Death and the Transformation of Objects and Their Value' (2010) 103 *Thesis Eleven* 54, 55).

⁶⁴ Goodnow and Lawrence (n 56) 78.

personal possessions.⁶⁵ However, birth order and gender also have a role to play here- for example, a brother is more likely to claim a father's watch than his sisters, while a mother's wedding ring often ends up with the eldest daughter.⁶⁶

IV. THE EMOTIONAL IMPACT OF WILLS

Mayersak has argued that the 'emotional elements present in wills...disputes are not presented, or at least not as prevalent, as in other litigated matters'.⁶⁷ While death, sibling strife and attachments to property are key contributors, the deceased's will is a highly emotive document- adding another layer of complexity.

Finch and others describes the will as a 'unique form of communication between the dead and the living'.⁶⁸ Imbued with a combination of legal and personal power,⁶⁹ wills do more than establish *what* the deceased valued in life; the distributional scheme indicates *who* was valued and the important role that certain individuals played in the deceased's personal narrative.⁷⁰ The final document 'gives permanent voice to the testator's wants',⁷¹ articulating his/her thoughts and feelings on intensely private matters in what is ultimately a very public statement of intent. As financial legacies shade into affective ones, parental wills elicit a strong emotional response among grown-up children. Where the distributional scheme is more or less what the latter anticipated, the will can be a source of comfort and affirmation. Yet, where it creates an unexpected and seemingly unjust division, the will can elicit a hostile response, generating feelings of shock, outrage and disbelief.

Both the language used in the will, and the way in which the document is framed, are also important. The fact that wills are written in the present tense reinforces the idea that the

⁶⁵ Stum (n 60) 194.

⁶⁶ See the general discussion in Drake (n 4) 98.

⁶⁷ Mayersak (n 44) 405. Mayersak exceptionalises wills in the trusts and estates context of her article. Of course, other litigated matters are deeply emotional, even if they do not raise exactly the same emotional issues being discussed here (the family law arena is an obvious example, if we think about divorce decrees and orders terminating parental rights as two basic illustrations).

⁶⁸ Finch et al (n 4) 1. See also P Vines, "In the Name of God, Amen": Seeking the Testator's Authentic Voice in Research Using Wills' (2006) 6 *Law, Text and Culture* 63, 63: 'Wills are documents which have a unique power. No other document can communicate beyond the grave in the voice of the deceased with the same combination of legal and personal power'.

⁶⁹ Vines (n 68), p 63.

⁷⁰ KJ Sneddon, 'The Will as Personal Narrative' (2012) 20 *Elder Law Journal* 355, 396-397.

⁷¹ AA DiRusso, 'Testacy and Intestacy: The Dynamics of Wills and Demographic Status' (2009) 23 *Quinnipiac Probate Law Journal* 36, 61.

parent is communicating directly with his/her children.⁷² Yet, the parent's 'voice' may not be one that the children recognise, despite this being one of the most personal (and ultimately final) exchanges between them. Lawyers drafting wills for their clients adopt standard forms of legalise to ensure an operative, transactional document; the result is an emotionally sterile and depersonalised narrative, which speaks in an unfamiliar manner.⁷³ Recent commentaries have suggested that testators (aided and encouraged by lawyers) should include more expressive language in their wills, directly conveying their thoughts and feelings as part of the distributive process.⁷⁴ Glover highlights the therapeutic aspect of this approach, in allowing the testator to articulate both positive and negative emotions in the hope that doing so will 'ease family conflict during the administration of the estate'.⁷⁵ In the parent-child context, expressive statements may be useful where the testator wants to explain the reasoning behind seemingly inequitable bequests- for example, that benefitting one child more than another reflects the former's straitened financial circumstances, as opposed to being a reflection of unequal love. Of course, there is always an element of risk. Explanations do not always convey what they are intended to; and just as beauty lies in the eye of the beholder, meaningful interpretation (despite the testator's best efforts) lies in the mind of the disappointed child. English novelist Daisy Goodwin, whose mother died in 2013 and left a will giving most of her estate to Goodwin's siblings because they needed it more, still struggles with the feeling that this was because her mother loved her less:

[W]hen a parent makes a will, they should be aware that although their children may be reasonable adults in every other respect, when it comes to inheritance, maturity dissolves into a puddle of childish resentments. Because when a beloved parent dies, what is being parcelled out may look like goods and chattels, but it feels a lot like love. A parent's will is not just a legal document; it is the last expression of their thoughts and feelings towards their children. It is a testament of love.⁷⁶

⁷² Present tense drafting creates an overwhelming sense that the deceased 'is sharing his or her thoughts at the moment of probate' - Sneddon (n 70) 387.

⁷³ See KJ Sneddon, 'Speaking for the Dead: Voice in Last Wills and Testaments' (2011) 5 *St John's Law Review* 683.

⁷⁴ Sneddon (n 73) suggests that lawyers and others drafting wills should try to consciously craft a persona that injects the individual's voice into the will, while ensuring that the documents continues to be legally effective. See also M Glover, 'A Therapeutic Jurisprudential Framework of Estate Planning' (2012) 35 *Seattle University Law Review* 427, 455-461 and the sources cited therein.

⁷⁵ Glover (n 74) 460. See also TP O'Sullivan, 'Family Harmony: An All Too Frequent Casualty of the Estate Planning Process' (2007) 8 *Marquette Elder's Advisor* 253.

⁷⁶ D Goodwin, 'I Leave My Daughter Daisy Out Of My Estate (*The Sunday Times*, London) 7 December 2014.

V. BEQUEATHING AN APPROPRIATE EMOTIONAL LEGACY: THE ROLE OF THE PARENT

Safer has noted that '[w]henever families gather, siblings notoriously take up their accustomed positions and reproduce their original dynamics, as though the roles were etched on their brains, ready to be magically reconstituted when the cast reassembles'.⁷⁷ That old resentments and rivalries should mysteriously re-surface is hardly surprising. However, a key member of the cast is now missing: the dead parent, who mediated sibling disputes in the past, but is no longer there to prevent simmering tensions from spilling over.

While it would be easy to say that the deceased's absence exposes fault lines within sibling relationships, inheritance disputes are as much about the parent-child relationship as its sibling-sibling correlate. We instinctively assume that parents will divide their wealth equally among their offspring; studies tend to bear this out,⁷⁸ and any differential in treatment tends to be viewed as an overtly negative act of parental favouritism. Yet there are positive reasons why some parents leave uneven bequests- for example, a child who lived with and looked after their parent(s) may be rewarded more than one who was less attentive or assumed less of the caregiving burden (thereby reflecting core notions of interfamily economic exchange, and reparation for sacrifices rendered); the previous section raised the possibility of a parent bequeathing a larger sum to a child with greater financial need than his/her siblings.⁷⁹ As much as this generates resentment and anger amongst the other children, it is not clear that unequal division is manifestly unfair here or that it should be undone.⁸⁰

⁷⁷ Safer (n 28), 59-60.

⁷⁸ Empirical studies around inheritance reveal that 'equal treatment of children is seen as the norm' and 'reigns supreme when it comes to the division of major assets'- Finch and Mason (n 49) 77. See also H Conway and Lisa Glennon, *'To Give or Not To Give?': The Transmission of Wealth On Death by Older Persons*, Report for the Changing Ageing Partnership, Institute of Governance, Queen's University Belfast (October 2010) (interviews carried out with focus groups confirmed that the majority of parents with more than one adult child intended to benefit them all equally). For a discussion of equivalent trends in the US, see Drake (n 4) 97 and TA Dunn and JW Phillips, *Do Parents Divide Resources Equally Among Children? Evidence from the AHEAD Survey*, Centre for Policy Research, Maxwell School of Citizenship and Public Affairs, Syracuse University (Aging Studies Programme (Paper No 5), 1997). However, studies have shown that unequal treatment is more common with lifetime gifts, with parents taking account of their children's respective earning powers, financial needs and circumstances when giving them different levels of monetary support- see Dunn and Phillips (ibid), as well as M Lundholm and H Ohlsson, 'Post Mortem Reputation, Compensatory Gifts and Equal Bequests' (2000) 68 *Economics Letters* 165.

⁷⁹ See generally McMullen (n 38) 78-79 and JC Tate, 'Caregiving and the Case for Testamentary Freedom' (2008) 42 *University of California Davis Law Review* 129.

⁸⁰ Equal distribution could be perceived as unfair or unjust by the caregiving or financially needy child, precipitating family breakdown.

Making a will is a poignant act, which forces an individual to confront their own mortality, assess their life's achievements and contemplate their post-mortem legacy.⁸¹ If contemplating an uneven estate distribution, McMullen argues that parents should think 'long and hard about the bitterness and fighting' that might result amongst their children, especially when the parent is not there to 'explain or defend' their actions, or to 'soothe hurt feelings and feelings of rejection'.⁸² More importantly perhaps, parents should be mindful of the old adage that 'honesty is the best policy', and tell their children what they are contemplating well in advance⁸³- instead of leaving their grieving off-spring to discover this for themselves when the contents of the will are revealed during what is already an emotionally fraught time (and when explanations written into the will itself might not be enough, no matter how clear or well-meaning).⁸⁴ Adopting this approach would also give the children time to come to terms with the intended estate division, and to understand the parent's motivations, instead of the disappointed sibling simply seeing this as a final statement that their parent loved them less and the same parent's memory being tarnished by the contents of the will. Engaging in these conversations presents its own challenges, because of an ingrained reticence to discuss such a sensitive topic. As Isaacs explains:

Discussion of death and aspects of death by children with their parents in our society is still a major taboo. Parents generally keep the provisions of their will secret, and those who stand to inherit generally do not inquire about the will or the specific provisions involved in it. This leaves the parents in a position to decide unilaterally on the division of their estate without the unpleasantness of having to explain to potential recipients why specific decisions were made.⁸⁵

⁸¹ Sneddon (n 70) 359, describing this as 'journey of self-discovery'.

⁸² McMullen (n 38), p 87.

⁸³ 'To avoid leaving a legacy of injured relationships, older parents do best to grapple realistically with the power they hold, rather than avoid facing this truth'- W Lustbader, 'Conflict, Emotion and Power Surrounding Legacy' (1996) *Generations* 54, 54.

⁸⁴ For example, Daisy Goodwin's mother included a line in her will to the effect that: 'I leave my daughter Daisy out of the estate, not because I love her any the less but because I think she has less need of it' (n 76). In spite of this, Goodwin still feels that her mother did not love her as much Goodwin's other siblings.

⁸⁵ Isaacs (n 4). Though this social-cultural reticence may reflect a particular generation; the baby boomers, who have been more open about money, religion and sex than previous generations, may be more willing to disclose the contents of their wills to their children. I am grateful to Professor Vines for drawing this to my attention.

However, the last point highlights what can be a significant emotional barrier to open disclosure: parents may be reluctant to reveal a will's contents, fearful that their children will be hurt, withdraw care and support, or pressurise the parent into changing their mind.⁸⁶

Of course, there is an uncomfortable reality that we may be reluctant to confront here: by favouring unequal division (and in some cases, disinheriting a child) parents *are* admitting a preference for a particular son or daughter. Society assumes that parents love all their children equally, and the 'the norm of equal attachment' is perhaps one of the greatest 'social perceptions regulating parents' relations with their children'.⁸⁷ Parents, in turn, may feel constrained by societal constructs of fairness and equality- and how an unequal or seemingly inequitable estate distribution would be perceived, despite how they feel about each of their children. Take Faith, Goff and Tollinson's analysis of sibling rivalry traits in competition for intergenerational wealth transfers, the authors drawing on earlier studies carried out by Berheim and Severinov:

Berheim and Severinov...assume that children care about how much their parents love them relative to their siblings and use bequests as a signal of parental affection. They show that under certain conditions, altruistic parents, whether they in fact love their children equally or not, choose equal bequests so that their kids will not suffer from any perceived inequalities in parental affection. Thus equal division becomes the social norm.⁸⁸

However, not all parents are thus inclined when it comes to estate distributions, and what precedes them. Overt acts of parental favouritism are perhaps more common than we think: consider the biblical example of the favourite son Joseph in the Book of Genesis,⁸⁹ and a recent anonymous English survey which suggested that parents (while not willing to admit it) do have a favourite child.⁹⁰ In legal jurisdictions where there is no principle of compulsory

⁸⁶ There is also the possibility that, raising the issue in the hope of preventing bitterness and fighting between one's children at a later stage, simply runs the risk of bringing the dispute forward.

⁸⁷ J Aldous, E Klaus and DM Klein, 'The Understanding Heart: Aging Parents and Their Favorite Children' (1985) 56 *Child Development* 303, p 303.

⁸⁸ RL Faith, BL Goff and RD Tollinson, 'Bequests, Sibling Rivalry and Rent Seeking' (2008) 136 *Public Choice* 397, 398. Lundholm and Ohlsson (n 78) also suggest that parents are aware of the public nature of bequests under wills, and want to avoid the post-mortem reputational damage they would 'suffer' if they left their children uneven amounts.

⁸⁹ 'Now Israel loved Joseph more than all his children, because he was the son of his old age: and he made him a coat of many colours' (Genesis 37:3).

⁹⁰ One in 12 parents admitted to having a child they liked more than their other offspring, while eight per cent said they had a child who they treated differently because that child was their favourite- J Stevens, 'One in 12 Parents Admits to Having a Child They Love More Than the Rest', *Daily Mail* (London, 21 February 2013) located at <<http://www.dailymail.co.uk/news/article-2281781/1-12-parents-admits-having-child-love-rest.html>>

succession, parents can treat their children unequally when making an estate distribution- reflecting the fact that a particular child is ‘the favourite’, or that the parent does not, for example, have a close and loving relationship with one child or does not approve of that particular child’s lifestyle choices etc. An unequal estate distribution may feel like an obvious choice in these circumstances; the dead parent may also ‘lack inhibitions at death which tempered [their]...conduct during life’,⁹¹ and is ‘exempt from the consequences’⁹² of their actions. Disinheriting a child (or treating them less favourably than their siblings) is the ultimate parental sanction, a final and lasting signal of displeasure, disappointment and rejection.⁹³

Brody has suggested that discrepancies in a parent’s treatment of their children ‘create negativity in the sibling relationship by inducing feelings of rivalry and anger’.⁹⁴ In the will-making context, this suggests that parents play a significant role in what materialises between their children following a parent’s death. However, this is only part of the picture; it is ultimately the siblings themselves who are responsible for *perpetuating* old grievances and resentments which re-emerge here, particularly when they are adults. As Safer has remarked:

Parents are responsible for converting sibling rivalry into sibling strife in the first place, but it is the siblings themselves who perpetuate it...Even when they are adults- even when their parents are dead- many siblings nurse memories of slights, recalling to their detriment who was preferred and who was overlooked...⁹⁵

An unequal inheritance simply provides another excuse for keeping sibling feuds alive, long after the parent is dead.

VI. THE LAW’S RESPONSE TO CONTESTED WILLS

(accessed January 2016). See also J Kluger, *The Sibling Effect: What Bonds Among Brothers and Sisters Reveal About Us* (Riverhead Books, 2013), the author citing a study by researchers from the University of California which followed 384 sibling pairs and their parents for three years; its findings suggested that 65 per cent of the mothers and 70 per cent of fathers exhibited a preference for one child.

⁹¹ AJ Hirsch and WKS Lang, ‘A Qualitative Theory of the Dead Hand’ (1992) 68 *Indiana Law Journal* 1, 13.

⁹² McMullen (n 38) 87.

⁹³ ‘To be disinherited by a parent is to be disowned- to become an orphan retroactive to birth. Even to receive less than other beneficiaries who are similarly situated is exquisitely painful’- Accettura (n 38) 35. See also Lustbader (n 83) 56: ‘Inflicting a hurt that can never be redressed, the most painful power a parent can wield is to punish from the grave’.

⁹⁴ Brody (n 26) 7.

⁹⁵ Safer (n 28) 58.

When it comes to bequests from parents to children, equal treatment now tends to be viewed as the parental and social norm.⁹⁶ This means that non-conformist estate distributions often attract judicial scrutiny, if challenged by a marginalised or excluded child.

Although testamentary freedom is a foundational principle of common law legal systems, the idea is most firmly entrenched in American legal jurisprudence. Courts here cannot simply overturn an estate distribution, since they have no authority to vary the terms of an otherwise valid will. However, herein lies the problem: a judicial tendency to invalidate wills on slender evidence of non-compliance with the requisite formalities, where a testator has excluded their immediate family. Foster has noted that such wills raise ‘judicial red flags’ and are more susceptible to defeat on grounds of undue influence or lack of mental capacity,⁹⁷ sentiments echoed more recently by Johnson:

Numerous commentators have noticed that testamentary plans that conform to social norms, such as providing for members of the decedent’s family, are likely to be upheld; while wills that seek to dispose of a testator’s property in a less conventional manner are often defeated on various grounds...⁹⁸

What Leslie describes as ‘covert manipulation’⁹⁹ of legal doctrine to invalidate non-traditional wills can also be invoked where parents exclude children completely or favour one child at the expense of the other(s).¹⁰⁰ The judicial tendency towards this produces an ironic result: people are encouraged to write wills where they ‘desire a non-standard [estate] distribution’,¹⁰¹ but the resultant legal scheme is vulnerable if it seems inconsistent with prevailing socio-cultural norms. The property owner’s ability to make free choices can be heavily circumscribed here, because of a judge’s socially-conditioned, subjective disapproval of what the will-maker has done.

⁹⁶ ‘[A]t least in the normal situation of a parent liking all the children, ignoring the values of rewarding a child who has helped the parent more...or the child in greater need of the money’- Isaacs (n 4).

⁹⁷ F Foster, ‘The Family Paradigm of Inheritance Law’ (2001) 80 *North Carolina Law Review* 199, 211.

⁹⁸ ID Johnson, ‘There’s a Will, But No Way: Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?’ (2011) 4 *Estate Planning and Community Property Law Journal* 105, 106 and the sources listed in support. See also MB Leslie, ‘The Myth of Testamentary Freedom’ (1996) 38 *Arizona Law Review* 235, 236 (‘Notwithstanding frequent declarations to the contrary, many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent’) and R Madoff, ‘Unmasking Undue Influence’ (1997) 81 *Minnesota Law Review* 571, 576 (‘the undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms’).

⁹⁹ Leslie (n 98) 236.

¹⁰⁰ Though wills which favour one child may still be upheld where ‘disinheritance of the other children was apparently based on their unworthiness relative to the child who was the primary beneficiary’- see Johnson (n 98) 116 and the various cases cited therein.

¹⁰¹ Johnson (n 98) 110.

Similar trends can be seen on the other side of the Atlantic.¹⁰² However, English law offers a more direct route for challenging wills where a deceased parent exhibits a clear preference between their offspring, or excludes a particular child. The Inheritance (Provision for Family and Dependents) Act 1975 governs what is known as ‘family provision’ in this country, allowing specific individuals to challenge a valid will¹⁰³ on the basis of relational or dependency ties to the deceased which transcend death.¹⁰⁴ If successful, financial provision can be made for the applicant from the deceased’s estate, despite the fact that no such reward (or a substantially lower one) was contemplated under the deceased’s will.¹⁰⁵ Adult children can apply,¹⁰⁶ on the basis that a deceased parent failed to make ‘reasonable financial provision’ for them.¹⁰⁷ Judges have consistently stressed that it is *not* their function to re-write the deceased’s will or pass moral judgment on the deceased’s actions; in any application under the 1975 Act, courts cannot simply overturn what seem like blatant injustices or provide for someone who feels hard done by.¹⁰⁸ Yet, context is everything, and as Arden LJ pointed out in the first Court of Appeal judgment in *Ilot v Mitson*,¹⁰⁹ what

¹⁰² For example, in *Sharp v Adam* [2005] EWHC 1806 (Ch) (upheld on appeal at [2006] EWCA 449) the testator was suffering from secondary progressive multiple sclerosis, and was paralysed and unable to speak when he made his final will. He left the bulk of his estate to two employees, along with a legacy for a carer, but excluded his two adult daughters who had previously been the primary beneficiaries. The judge held that the deceased lacked testamentary capacity, most likely because of a ‘temporary poisoning of his natural affection for his daughters, or a perversion of his sense of right, which nobody could satisfactorily explain’ ([2005] EWHC 1806 (Ch), [254]). The fact that the estate distribution favoured non-family members was undoubtedly the key factor here- for an overview of this and other similar cases, see J Aspen, ‘Where Now for Testamentary Freedom?’, *The Barrister Magazine* (2010).

¹⁰³ Or intestacy distribution- though the emphasis here is on testate deaths.

¹⁰⁴ For an overview, see G Douglas, ‘Family Provision and Family Practices-The Discretionary Regime of the Inheritance Act of England and Wales’ (2014) 4 *Oñati Socio-Legal Series*.

¹⁰⁵ New Zealand was the first country to limit freedom of testation in this manner, under the Testator’s Family Maintenance Act 1900. Similar statutory schemes were subsequently adopted by other common law jurisdictions- see L Englefeld, *Australian Family Provision Law* (Australia, Lawbook Company, 2011) and C Harvey and L Vincent, *The Law of Dependents’ Relief in Canada* (Toronto, Carswell, 2nd edn, 2006). However, the United States remains a notable exception.

¹⁰⁶ Section 1(1) of the 1975 Act lists the eligible categories of claimant, and includes ‘a child of the deceased’ (s 1(1)(c)). There is no age restriction.

¹⁰⁷ 1975 Act, s 1(2). Failure to make reasonable financial provision underpins the legislation. However, with the exception of a surviving spouse or civil partner of the deceased, all other claims under the 1975 Act are restricted by a ‘maintenance’ threshold under s 1(2)(b)- in other words, reasonable financial provision is defined by what it would be reasonable for the applicant to receive for his/her maintenance. The concept of ‘maintenance’ is not defined in the statute, although the following dictum of Goff LJ in *Re Coventry* [1980] Ch 461, 485 is still regarded as authoritative: ‘What is proper maintenance must...depend on all the facts and circumstances of the particular case... [I]t is not just enough to enable a person to get by, [but] on the other hand, it does not mean anything which may be regarded as reasonably desirable for [an applicant’s] general benefit or welfare’.

¹⁰⁸ See for example, the comments of Oliver J at first instance in *Re Coventry* [1980] Ch 461, 475.

¹⁰⁹ [2011] EWCA Civ 346.

constitutes reasonable financial provision must take account of ‘current social conditions and values’.¹¹⁰ More importantly, when deciding family provision claims, judges must:

...decide questions involving value judgments within four corners of the statutory framework and with the benefit of their own awareness and experience of society and social issues, and their own considered view of how such matters ought fairly to be decided in the society in which we live.¹¹¹

The mere fact that an individual is a child of the deceased does not generate any automatic entitlement to an (increased) inheritance; the system is a discretionary one, with clear statutory parameters.¹¹² However, judicial decision-making appears, on occasion, to be influenced by prevailing socio-cultural norms around how parents should treat their children when passing on wealth.¹¹³ In some instances, courts have not been inclined to rule in favour of an adult child who has been left nothing (or little) under a parent’s will, deciding that financial need was not enough in itself and that a long-term rift between parent and child ‘justifies’ no inheritance provision.¹¹⁴ In others, claims have been allowed based on inequalities in the respective life positions of siblings,¹¹⁵ or a particular son or daughter’s lack of earning capacity.¹¹⁶ The long-running litigation in *Ilot v Mitson*,¹¹⁷ where a mother excluded her only child from an estate worth close to £500,000, may also signal a more expansive approach. In July 2015, the Court of Appeal awarded the daughter £163,000, despite the fact that mother and child had been estranged for almost 40 years and the mother was clear in her intent to exclude the daughter from the will and had communicated this to

¹¹⁰ Ibid, [67].

¹¹¹ Ibid, [68].

¹¹² Courts are instructed to take account of specific factors- for example, the financial resources and future needs of the applicant, those of the other estate beneficiaries, the size of the estate, and any mental or physical disability of the applicant to name but a few (1975 Act, s 3(1)). For applications by children, the court must also specifically look at the ‘manner in which the applicant was being, or...might expect to be, educated or trained’ (s 3(3)).

¹¹³ Though it is difficult to tease a clear jurisprudential thread from a highly fact-specific array of cases- see H Conway, ‘Do Parents Always Know Best? Posthumous Provision and Adult Children’ in W Barr (ed), *Modern Studies in Property Law: Volume 8* (Oxford, Hart, 2015) ch 7.

¹¹⁴ See for example, *Re Garland* [2007] EWHC 2 (Ch).

¹¹⁵ *Re Creaney* [1984] NI 397 (bulk of father’s estate left to his financially secure daughter; deceased’s son was not financially well-off). Although this is a Northern Ireland case, the exact same statutory framework applies under the Inheritance (Provisions for Family and Dependents) (NI) Order 1979.

¹¹⁶ *Re Hancock* [1998] 2 FLR 346 and *McKernan v McKernan* [2007] NICH 6. In the latter case, the daughter’s claim succeeded, despite the court accepting that the deceased was ‘quite clear in her mind that she did not want to leave a legacy to her only daughter’ (ibid, [27]) and that she viewed her daughter as ‘lazy’ (ibid, [36]), as well as the court acknowledging that the mother ‘was entitled to exercise a preference amongst her children’ (ibid, [38]).

¹¹⁷ [2009] EWHC 3114 (Fam); [2011] EWCA Civ; [2014] EWHC 542 (Fam); and [2015] EWCA Civ 797.

her several years earlier.¹¹⁸ *Mitson* not only re-opens the issue of allowing courts to interfere with testamentary freedom, and a will-maker's 'right to spite'; it will encourage more independent adult children¹¹⁹ to claim under the 1975 Act, regardless of the deceased's express wishes.¹²⁰

Estate contests involving adult children require judges to resolve what are effectively emotional issues after a parent's death- dealing with overtly negative sentiments, complicated family histories and enduring estrangements which the parties themselves could not resolve while the parent was still alive, and which may have been perpetuated for decades. Resorting to concepts such as non-compliance with formalities, duress or undue influence (the dominant models for invalidating wills in the US) or legislative constructs of 'reasonable financial provision' (under the English family provision system) allows judges to seek solace in established legal precepts and to place a veneer of objectivity on their decisions. There may also be therapeutic benefits for those involved in the dispute, as framing the outcome in this way reduces the amount of (additional) damage being inflicted on an emotionally vulnerable yet volatile family 'unit' which has already been pushed to breaking point. Yet, judges are seldom dispassionate and neutral observers,¹²¹ and estate contests between adult siblings are no exception. The conclusions reached in some of these cases suggest that judges are, in many ways, 'passing judgment' on whether children should be treated equally; who was a good and dutiful child; who showed the dead parent proper love, respect and attention;

¹¹⁸ The facts merit closer attention. In 1978, the 17-year-old daughter left home to live with a man of whom her mother disapproved; mother and daughter were not reconciled before the mother's death in July 2004. After executing her final will in April 2002, the mother informed her daughter in a letter that she would be excluded due to the pain which the daughter had inflicted on the mother. The daughter responded in another letter, indicating that she understood that she would receive nothing. When the mother died, her only child was aged 44 and had five children of her own, had not worked since the birth of her first child (the husband worked part-time) and was living in a 3 bedroomed house rented from a Housing Association; the mother's entire estate went to various animal welfare charities. The daughter argued under the 1975 Act that her mother had failed to make reasonable financial provision for her, and the district judge awarded her £50,000 from the estate. However, the daughter appealed on the basis that this amount was insufficient. Eleanor King J reversed the earlier decision- under the legislation, it was not a question of whether the mother had acted unreasonably; the parties' estrangement was 'profound and enduring' and while the daughter was in financial need this was the result of her own 'lifestyle choices'- [2009] EWHC 3114 (Fam), [61]. However, this decision was overturned by Court of Appeal- [2011] EWCA Civ 346. The daughter's outstanding appeal was then remitted to the High Court which upheld the original award of £50,000 (despite the daughter seeking half the value of the estate)- [2014] EWHC 542 (Fam). Following a further appeal by the daughter, the Court of Appeal raised this amount to £163,000- [2015] EWCA Civ 797. At the time of writing, the charities had been given leave to appeal the decision on quantum to the Supreme Court.

¹¹⁹ In other words, those who are economically self-sufficient (or, at least, capable of earning their own living), and who were not financially dependent on a deceased parent before death (even if in financial need).

¹²⁰ J Holland, '*Ilot v Mitson: A Lesson For Practitioners?*' (2012) 2 *Elder Law Journal* 59.

¹²¹ TA Maroney, 'The Persistent Script of Judicial Dispassion' (2011) 99 *California Law Review* 629. See also the same author's chapter in the current collection- Maroney, Ch 12.

and whether the deceased was ‘justified’ in treating his/her children differently or was simply being spiteful. These are all extremely difficult (and highly subjective) value-judgments for courts to make.

Of course, judges have their own intuitive sense of what is morally and emotionally acceptable, and not just because of the family scenario that unfolds before them as both sides present their evidence. Perhaps we should not be too surprised if judges (who bring their own emotional instincts and cultural ‘baggage’ to the cases which come before them) may be tempted to correct parental disinheritance or unequal distribution between children in some way.¹²² In many ways, the ‘normative expectation that parents will leave their estate to their children create[s] a corresponding right of the children to receive’¹²³ and judges are using whatever legal tools they have at their disposal to achieve this. This creates its own problems; as Drake has pointed out, ‘[i]t is precisely the discretionary quality of inheritance giving that renders it powerfully symbolic of parental responsibility and affection’.¹²⁴

VII. LIMITING THE EMOTIONAL FALL-OUT

Most sibling inheritance disputes have their genesis in issues which are not solely related to the distribution of the dead parent’s estate. Old family grievances masquerade as a quarrel over money, property and material possessions, with the parties hiding behind the institutional façade of the law to revisit past wrongs. As Folberg has pointed out:

[F]amily property and financial disputes...are matters of the heart and the law. They present challenges for how emotions and family dynamics are to be weighed against and balanced with legal rights and obligations.¹²⁵

The question here is not whether emotions should be recognised in the law’s response to sibling inheritance disputes; they are intrinsic and integral components of the legal matrix because these disputes are driven by and create emotion. And while lawyers and other legal

¹²² Though it is worth noting that, in family provision claims, courts have not substituted an equal division just because an adult child has been treated less favourably than their siblings- see for example, *Re Hancock* [1998] 2 FLR 346 and *Re Creeny* [1984] NI 397. In contrast, if a will is declared invalid in the US on any of the grounds mentioned (eg. non-compliance with formalities, duress), the estate would usually lapse into intestacy and the deceased’s children would automatically inherit in equal shares.

¹²³ Drake (n 4) 96.

¹²⁴ Drake (n 4) 96.

¹²⁵ Folberg (n 37) 12.

actors already recognise this, more could be done to lessen the emotional fallout from an uneven estate distribution between children.

The role of the lawyer is an important one when the parent is making will. It goes without saying that lawyers are obliged to reflect their client's wishes, and to ensure a legally binding document. However, the preoccupation with legalise and property arrangements often detracts from advising clients on the emotional legacy which the document will also generate. Noting that the estate planning process provides a unique opportunity for exploring someone's personal legacy, Sneddon argues that an 'attorney drafts person... must be more than a mere transcribing device'.¹²⁶ Encouraging will-makers to appreciate the emotional ramifications of their choices if contemplating uneven bequests, and to discuss this sensitively with their children in advance, are important tools. Legal drafting can take account of emotions as well. Varying the language used in the will, to generate a more personal narrative and explain the parent's reasons for specific bequests, might also ensure that lawyers are the first stage in preventing family conflict.¹²⁷

When sibling inheritance disputes end up in the legal arena, judges need to be cognisant both of the intense emotions at play but also of their limited ability to address these emotions in a judicial setting. By producing a certain result, judges can mitigate some of the hurt (both financial and emotional) inflicted by the dead parent. Invalidating a will on what might be minimal evidence of non-compliance with formalities is a classic example, as is the strategy of appeasement facilitated by the family provision system whereby judges can give the disadvantaged sibling something out of the estate. The big difficulty is that the doctrine of testamentary freedom is supposed to have some force, and overthrowing or changing the will undermines that. And while we might argue that judges should spend more time trying to discover a testator's underlying intent without judging his/her motives, Baron makes the point that 'empathy carries risks' because the 'finder of fact may be unable to cast aside his or her own beliefs in the attempt to grasp another's'.¹²⁸

Another option would be to move away from a court-centric decision making process, towards alternative dispute resolution. Of course, under the current regime, the actual

¹²⁶ Sneddon (n 70) 375-376.

¹²⁷ O'Sullivan (n 75) 25.

¹²⁸ JE Baron, 'Empathy, Subjectivity and Testamentary Capacity' (1987) 24 *San Diego Law Review* 1043, 1044.

litigation can be seen as a form of emotional catharsis; a sibling who feels excluded or marginalised by a parent's will is able to raise issues which have been festering for years, and to finally vent his/her feelings in public. However, the emotionally charged litigation route has obvious drawbacks. Sibling inheritance disputes (like any family dispute) involve ongoing relationships, yet an adversarial system 'affirms for the parties that the contest is about winning and losing'¹²⁹- tapping into the same feelings which plagued the disenfranchised sibling throughout their childhood (though one could argue that everyone involved in these cases invariably feels hurt or angry). Court proceedings also dissipate the estate, and create further animosity between the siblings who, having just lost their sole, surviving parent, are now 'on the way to irrevocably losing each other'.¹³⁰ In exploring other options, legally mandated mediation could offer a better alternative, and not just because it should be cheaper and more efficient; everyone involved could address the underlying emotional issues, develop a uniquely responsive solution within a private setting (since the dispute is not played out in a public form) and perhaps restore some measure of family harmony.¹³¹ As with any solution, there are drawbacks. Mediation is not always effective, and research carried out in Australia suggests that it is more likely to fail in family provision disputes between siblings than in other categories of litigant:

[A]necdotal comments from lawyers and mediators [suggest] that cases between siblings are the most bitterly fought of all. All other relationships seem more amenable to resolution through mediation. This is probably simply an expression of the fact that sibling rivalry is a lifelong psychological construct which is hardly likely to melt away with ease.¹³²

Because siblings have already had longer (in reality, most of their lives) to get into their positions, there is no guarantee that mediation will succeed; and even if a solution can be reached, the resultant damage may be beyond repair so that siblings will be estranged from, or actively hostile towards, each other for years to come. Despite this, mediation should be encouraged, and given every chance to work. Resolving disputes without going to court not

¹²⁹ Weinstein and Weinstein (n 45) 375.

¹³⁰ LP Love, 'Mediation of Probate Matters: Leaving a Valuable Legacy' (2001) 1 *Pepperdine Dispute Resolution Law Journal* 255, 255.

¹³¹ Love (n 130) 256. Mayersak (n 44) also argues that arbitration offers a better chance of minimising conflict and preserving family relationships (though perhaps 'salvaging' what's left of family relationships would be a better descriptor).

¹³² P Vines, *Bleak House Revisited: Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria* (Australasian Institute of Judicial Administration, 2011) 32. The same report also found that the most disproportionate level of costs in family provision cases were in sibling disputes, well ahead of disputes between first families and later spouses- *ibid*, 14.

only allows everyone involved to retain some measure of control over the process. It also enables complex emotions to be expressed, acknowledged and recognised,¹³³ with a view to lessening the overall emotional harm and (ideally) paving the way for reparation- or, at the very least, inflicting less damage than adversarial litigation.

VIII. CONCLUSION

Inheritance disputes are not so much about money. People fight over the love they feel they did not receive.¹³⁴

Estate contests are not just about property and financial issues; they involve relational issues as well. The result is an inherently complex emotional dimension, something which is especially true in disputes between adult siblings over the distribution of parental wealth. Most of these disputes are not simply driven by money (though that may be a factor as well); they are emotionally driven, because specific bequests are viewed as posthumous representations of ‘love, validation, and importance’¹³⁵ between parent and child. Underpinning this are deep-seated feelings of sibling rivalry with all its negative traits, mixed with an equally toxic cocktail of grief emotions at a time of intense personal (and familial) upheaval.

Many people engage in destructive litigation; but sibling inheritance disputes take this to another level because of ongoing family relationships and the emotional backdrop to the litigation. These disputes become all-consuming. Each side ‘demonises the other’¹³⁶ in what will usually be very public litigation over a very private issue (something of a paradox in itself). The impact of the dispute reverberates through the entire family, resulting in emotional wounds which, in more extreme scenarios, ‘may be fatal or take generations to heal’.¹³⁷ In light of all this, there is much to be said for encouraging parents to be aware of the consequences of their actions from the outset, and for lawyers to be mindful of the role that they play in anticipating sibling disputes over parental wealth. By the time a dispute ends up in court, much of the emotional damage has already been done, and judges can only hope that their handling and resolution of the issues will not aggravate or perpetuate existing

¹³³ Themes which Huntington also highlights in her chapter- Huntington, Ch 2.

¹³⁴ Psychiatrist and author Reuvan Bar-Levav, quoted in Accettura (n 38) 1.

¹³⁵ Accettura (n 38) 2.

¹³⁶ Folberg (n 37) 9.

¹³⁷ Folberg (n 37) 9.

family tensions. Mediation is not a panacea, but offers one way of keeping these conflicts away from adversarial court proceedings in the interests of all concerned.

