British Inheritance Legislation: Discretionary Distribution at Death

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I. INTRODUCTION

In 1975 Parliament enacted the Inheritance (Provision for Family and Dependents) Act, altering in significant respects the balance struck in England between testamentary freedom and family protection. After more than a century during which testators had been at liberty to dispose of their property as they wished, the Inheritance Act of 1938 had partially restricted a testator’s freedom by permitting certain relatives to apply to the court for maintenance from his estate, regardless of his testamentary dispositions. The 1975 Act expands the scope of the 1938 Act, giving courts the power to make “reasonable provision” out of a decedent’s estate not only for those relatives covered by the 1938 Act, but also for de facto dependants. The 1975 Act further provides that a court making an award to a surviving spouse need no longer be guided by a maintenance standard, but may make an award of any sum reasonable under all the circumstances, “whether or not it is required for maintenance.” Although the Act lists a...
number of factors to be considered by the court in arriving at a decision,\textsuperscript{10} the amount to be awarded is left to the court's discretion.\textsuperscript{11}

This English legislation and the experience under it are of interest to Americans in a period when family-protection aspects of succession legislation are undergoing re-examination.\textsuperscript{12} This Comment will explore whether the English experiment with discretionary distribution has any lessons for American law reform in the area.

The Comment begins by tracing the history of family-oriented limits on testamentary freedom in English law. It then discusses the legislative history of the 1975 Act and presents a detailed account of the Act's provisions. A number of cases brought under the Act are then surveyed. In order to facilitate a comparison between the American and English systems, the author presents a brief outline of family-oriented protective devices in American succession law. Next, the Comment discusses a number of defects in the American law as perceived by other writers. The Comment concludes with an analysis of the English discretionary method of distribution as a proposed remedy for some of these defects. The author suggests that the English discretionary system of estate distribution is not an ideal remedy for the defects of American succession law.

\textbf{II. THE BACKGROUND OF FAMILY-ORIENTED LIMITS ON TESTATION IN ENGLISH LAW}

In the Middle Ages, succession law in England provided for the surviving spouse and children of a testator, regardless of the testator's intent. Matters of probate with respect to personal property were primarily settled by ecclesiastical courts even until the nineteenth century.\textsuperscript{13} In these matters the ecclesiastical

\textsuperscript{10} Id. § 3(1).

\textsuperscript{11} Id.

\textsuperscript{12} A 1978 study of public attitudes about American succession laws revealed significant divergences between what people thought was the law, what they thought it should be, and what it actually was. Significantly, the study found that people thought intestacy laws should provide that the surviving spouse should receive the entire estate, rather than merely a fraction. Fellows, Simon \& Rau, \textit{Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States}, 1978 AM. B. FOUND. RESEARCH J. 319. Broader questions of social and legal importance were raised at the American Assembly sponsored by the Real Property, Probate and Trust Law Section of the American Bar Association in 1976. The essays presented to the Assembly are collected in \textit{Death, Taxes and Family Property} (E. Halbach ed. 1977). Three essays treat the problem of law reform vis-a-vis family protection: Haskell, \textit{supra} note 2; Friedman, \textit{supra} note 2; and Shaffer, \textit{supra} note 2.

\textsuperscript{13} Helmholz, \textit{Legitim in English Legal History}, 1984 U. ILL. L. REV. 659, 659. See also \textit{The Special and General Reports Made to His Majesty by the Commissioners Appointed to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales} 11-12, 25-43 (1832). The probate jurisdiction of the ecclesiastical courts was officially revoked by the Court of Probate Act, 1857, 20 & 21 Vict., ch. 77. For the current state of probate jurisdiction, see the Supreme Court Act, 1981, ch. 54, § 25 (probate jurisdiction vested in the High Court); Administration of Estates Act, 1925, 15 & 16 Geo. 5, ch. 23 (an intestate's estate "shall vest in the Probate Judge in the same manner and to the same extent as formerly in the case of personal estates it vested in the ordinary." Id. § 9).
courts took the Civil Law as their guide. The Civil Law principle of _legitim_ provided that a surviving spouse was to take one-third of the estate, and surviving children were to take among them another third. The right to _legitim_ was not uniformly enforced, however, and by the fourteenth century it had become merely a local custom persisting in York and London. The Act of 1724 abolished the custom of _legitim_ in London, where it had lingered the longest, thus ending restraint in England on the testamentary disposition of personal property.

The most significant restraint on the devise of land existed in the form of dower, by which the wife was given a protected life interest in each freehold estate of inheritance of which her husband was seised at any moment during their marriage. The effectiveness of dower as a protective measure, however, was severely curtailed by an 1822 decision of the Court of King's Bench. In the case of _Ray v. Pung_, that Court sanctioned the use of a device by which a husband could defeat his wife's dower interest. The Dower Act of 1833 allowed the husband the right to extinguish dower explicitly, either by deed or by will.

After 1833, therefore, a system of complete freedom of testation prevailed in England. This system was almost unprecedented in history.


15. See generally 2 F. Pollock & F. Maitland, _The History of English Law_ 348-56 (2d ed. 1899); 2 W. Blackstone, _Commentaries_ *491-96. The term "legitim" is used here to refer to the portions reserved to both the surviving spouse and children, although some writers have limited its use to the children's portion, calling the portion of the surviving spouse the "terce" or "jus relictae." See, e.g., M. Rheinstein & M. Glendon, _supra_ note 14, at 84.


17. Id. at 667. See also H. Swinburne, _Treatise of Testaments and Last Wills_, pt. 3, § 18 (1640) (on York, where Swinburne was a judge); and C. Carlton, _The Court of Orphans_ 47 (1974) (on London). Commentators have suggested various reasons for the disappearance of the enforceable right to a fixed share. One commentator has attributed the disappearance to the inconvenience of communicating with a forced heir who might well be far abroad in the era of English overseas expansion. See M. Rheinstein & M. Glendon, _supra_ note 14, at 83-84. The statute which abolished the Custom of London states that the Custom was seen as discouraging merchants "of wealth and ability" from becoming citizens of the city — with the attendant loss of revenues to the city. 11 Geo. I, ch. 18, § 17 (1724). See Helmholz, _supra_ note 13, at 670-72; C. Carlton, _supra_, at 42 (1974).

18. 11 Geo. 1, ch. 18 (1724).

19. For the classical description of dower, see 2 W. Blackstone, _Commentaries_ *129-39.

20. 5 B. & Ald. 561 (1822).

21. In _Ray v. Pung_, the husband had arranged to have a parcel of land conveyed to him in fee simple, but with a power of appointment. While dower would have protected his wife from any conveyance he might have attempted of the fee simple, the court held it ineffective against his appointment by deed. Thus the fee simple passed through the appointment, free and clear of the wife's dower. Id.

22. 3 & 4 Wm. 4, ch. 105 (1833).

23. The noted nineteenth-century legal sociologist Max Weber could find "evidence of complete or
was regarded as somewhat of an historical accident, and stood in marked contrast to the Continental systems. Indeed, Continental legal scholars, wrote Otto Kahn-Freund in 1938, found it "difficult to explain why — unlike any other European system of law — English law has so far omitted to protect a testator's family against arbitrary dispositions by will." Unprecedented historical accident or not, complete testamentary freedom came to be an accepted, even cherished, aspect of English law.

Nonetheless, English legal commentators and lawmakers began to question the concept of complete testamentary freedom, especially after the enactment in New Zealand, Australia, and the Canadian provinces of family-oriented restrictions on testamentary freedom. New Zealand had been the first to enact a statute limiting testamentary freedom, and it was the success claimed for the New Zealand experience that finally convinced the English lawmakers to afford


27. To the modern Englishman our modern law, which allows the father to leave his children penniless, may seem so obvious that he will be apt to think it deep-rooted in our national character. But national character and national law react upon each other, and law is sometimes the outcome of what we must call accidents.


32. Id. at 345. See also Gold, supra note 2, at 299-300. The New Zealand statute was said to have
a decedent's spouse and dependant children some protection from disinheritance. 33 Thus in 1938 Parliament enacted the Inheritance (Family Provision) Act. 34

While reverting in the 1938 Act to a measure of restriction on testamentary freedom, the English borrowed from New Zealand a novel method of accomplishing the restriction: they would allow the probate judge discretion to alter a decedent's will if "reasonable provision"35 had not been made for the maintenance of the decedent's spouse or children. 36 Judges sitting in review of early applications for provision under the 1938 Act repeatedly protested the difficulties of their task. 37 Commentators criticized the early reported decisions for the failure of probate judges to exercise discretion to restrain testamentary freedom in favor of the family, 38 especially when the failure to do so seemed to run counter to the policy of the 1938 Act. 39 For example, while the Act was conceived in part as a way of relieving the State of possible welfare burdens by delegating the duty of support to the family, a number of early decisions refused to order family provision out of a decedent's estate for the explicit reason that public funds were available to the applicant. 40 Also, judges discriminated against applications by widowers, "as they could be expected to maintain themselves," 41 although no such policy was expressed in the 1938 Act. 42 Despite these early growing pains, however, the 1938 Act survived as an accepted part of English practice. 43

resulted in no excessive litigation, and also to be a deterrent to a testator who might wish to disinherit his family. Robson, Freedom of Testation: The [1938 Inheritance (Family Provision)] Bill Compared with the New Zealand System, 1 MOD. L. REV. 296, 302-04 (1938).

33. Dainow, Limits on Testamentary Freedom in England, supra note 31, at 345; Gold, supra note 2, at 299-300; Robson, supra note 32, at 302-04.

34. 1 & 2 Geo. 6, ch. 45 (1938).

35. Id. § 1(1).

36. A 1954 French study noted that of thirty-one systems which restricted testation at that time, twenty-nine prescribed fixed portions to be distributed to certain beneficiaries. Interestingly, Maine and Massachusetts were the two exceptions. New Zealand, Australia, and the Canadian provinces were not included in this study. See Gold, supra note 2, at 299 (citing DE BOURBOUSSON, Du Mariage, Des Regimes Matrimoniaux, des Successions (1934)); see also Fratcher, Toward Uniform Succession Legislation, 41 N.Y.U. L. REV. 1037, 1055-56 (1966) (comparing the situation in Maine to the New Zealand and English legislation).


38. See Unger, supra note 37, at 225-28.

39. Id.


41. In re Silvester, [1941] 1 Ch. 87, 89.

42. See Unger, supra note 37, at 226 (citing In re Silvester, [1941] 1 Ch. 87 and In re Styler, [1942] Ch. 387).

43. For a positive assessment, written in 1960, of the practice under the 1938 Act, see Crane, Family Provision on Death in English Law, 35 N.Y.U. L. REV. 984 (1960).
To account for perceived inadequacies, Parliament amended the 1938 Act in 1952, making it applicable to intestacy, and extended it in 1958 to entitle former spouses to apply for maintenance. By the 1960's it had become clear to Parliament that experience, new ideas, and changes in society had made necessary a more substantial revision. Parliament therefore entrusted the newly-formed Law Commission with the task of studying proposals for a complete reform of the 1938 Act. In 1974, after several years of study, the Law Commission gave Parliament a set of detailed recommendations. Parliament incorporated these proposed reforms in the Inheritance (Provision for Family and Dependents) Act of 1975.

III. LEGISLATIVE HISTORY OF THE 1975 ACT

A. The Law Commission


In their First Annual Report, published in 1966, the Commissioners expressed the view that the Inheritance Act of 1938 needed "drastic overhaul." To this end, the Commissioners produced in 1971 a Working Paper which offered a number of choices for the reform of family property law.

1. 1971: Working Paper

The Working Paper faced as one of its central problems "the choice between discretionary powers and fixed rights as a basis for dealing with family property." The Commissioners stated that

[i]t is the discretionary nature of the parties' rights which, as we see it, is the fundamental cause of the present dissatisfaction with the law

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44. **Committee on the Law of Intestate Succession, Report, Cmd. 8510, ch. 4 (1951).**
45. Intestates' Estates Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 64.
46. Matrimonial Causes (Property and Maintenance) Act, 1958, 6 & 7 Eliz. 2, ch. 35, § 3.
47. **The Law Commission, First Programme, Law Com. No. 1, at 11 (1965).**
49. 1975, ch. 63, supra note 1.
50. Law Commissions Act, 1965, ch. 63, supra note 1. The Law Commission consists of five prominent judges and/or members of the bar, appointed by Parliament.
51. See **The Law Commission, First Programme, supra note 47, at 11.**
53. Id. para. 82. The Commissioners gave no explicit reason for this conclusion, but their 1971 Working Paper cited the discretionary nature of the parties' rights, unfairness to women, and uncertainty of property ownership as major sources of dissatisfaction with the law of family property as it then stood. **The Law Commission, Working Paper No. 42, paras. 0.15, 0.21, 0.22 (1971).**
55. Id. para. 0.23.
of property distribution on divorce and death]. In effect what women are saying, and saying with considerable male support, is: — We are no longer content with a system whereby a wife’s rights in family assets depend on the whim of her husband or on the discretion of a judge. We demand definite property rights, not possible discretionary benefits.56

The Working Paper noted two other reasons for dissatisfaction with the law of family property as it stood in England in 1971. First, the law of family property was allegedly unfair:

[I]t ignores the fact that a married woman, especially if she has young children, does not in practice have the same opportunity as her husband or as an unmarried woman to acquire property; it takes no account of the fact that marriage is a form of partnership to which both spouses contribute, each in a different way, and that the contribution of each is equally important to the family welfare and to society.57

The Commissioners also felt the law of family property to be unfair because the court now has wider powers to deal with property when a marriage is terminated by a decree of divorce . . . than it has when a marriage ends naturally with the death of one spouse. Thus the final irony has been reached: a divorced woman is better protected by the law than is a widow. Such is the price of piecemeal law reform.58

Other than the discretionary nature of family members’ rights and the alleged unfairness of family property law, a major source of popular dissatisfaction, shared by the Commissioners, was that the law led to uncertainty, particularly in relation to ownership of the marital home.59

As a basis for discussion, the Working Paper made a number of proposals for the reform of family property law. Two of the proposals dealt with the reform of the Inheritance Act of 1938.60 The Commissioners proposed as the first alternative an expansion of the Act of 1938 in order to give the court “wide discretionary powers to ‘re-write the will’ by allocating the property of the deceased in order to secure for the surviving spouse a fair share of the family assets, over and above her strict maintenance needs.”61 Along with this expansion of the surviving spouse’s entitlement under the 1938 Act, the Commissioners proposed an
expansion of the class of entitled applicants to include all children regardless of
sex, age, or marital status, as well as the decedent's de facto dependants.\(^\text{62}\) Under
this alternative the court would have the power to order property transfers and
settlements\(^\text{63}\) and to set aside certain \emph{inter vivos} transfers made by the decedent.\(^\text{64}\)
The Commissioners tentatively agreed that "this would not be an acceptable
solution, since property rights would be dependent on discretionary powers, and
great uncertainty, involving litigation and expense, would be introduced into the
administration of estates."\(^\text{65}\)

The second alternative reform of inheritance law proposed in the \emph{Working
Paper} was a system of "legal rights of inheritance"\(^\text{66}\) by which a surviving spouse
and possibly children\(^\text{67}\) would be entitled to fixed proportions\(^\text{68}\) of the estate,
regardless of the terms of the will, or the means, needs, or conduct of the
applicants.\(^\text{69}\) The Commissioners felt that this system of fixed rights should not
replace the system of discretionary distribution under the 1938 Act, but should
be added to it, so that "the right to apply for family provision should also be
retained to deal with those cases where legal rights were insufficient for the
survivor's needs."\(^\text{70}\)

The \emph{Working Paper} also suggested reforms which would institute statutory
co-ownership of the marital home,\(^\text{71}\) protection of the use and enjoyment of
household goods,\(^\text{72}\) and community property.\(^\text{73}\) Although the Law Commis­sion­ers contemplated the adoption of some combination of these reforms,\(^\text{74}\) they felt
that the institution of fixed legal rights of inheritance would make community
property unnecessary. These latter two reforms were therefore proposed as
alternatives.\(^\text{75}\)

2. 1973: \textit{First Report on Family Property}

The Law Commission consulted a number of groups and individuals concern­ing
the proposals presented in its 1971 \emph{Working Paper}.\(^\text{76}\) Among those who

\(^{62}\) Id. at 0.35.

\(^{63}\) Id.

\(^{64}\) Id. Courts already possessed these latter powers in cases of divorce. Id.

\(^{65}\) Id. at 0.34.

\(^{66}\) Id. pt. 4.

\(^{67}\) The Commissioners thought that children should probably not be included. Id. para. 0.40.

\(^{68}\) The Commissioners suggested £2,000 or one-third of the estate, whichever was greater. Id.

\(^{69}\) Id. at 0.36-0.41.

\(^{70}\) Id. at 0.48.

\(^{71}\) Id. pt. 1.

\(^{72}\) Id. pt. 2.

\(^{73}\) Id. pt. 5.

\(^{74}\) Id. paras. 0.45-0.49.

\(^{75}\) Id. at 0.37.

\(^{76}\) For the complete listing, see \textit{The Law Commission, Second Report on Family Property}, supra
note 25, app. 2; see also \textit{The Law Commission, First Report on Family Property}, supra note 59, paras.
3-7.
offered their views on the proposals for reform of the inheritance laws were several lawyers' professional organizations, women's groups, judges, practitioners, and family-law professors.77

Additionally, the Office of Population Censuses and Surveys sampled public opinion about the Commissioners' proposals.78 This national survey of married couples and formerly married people asked respondents about the management of their property and finances, their understanding of current family property law, and their opinions of some of the proposals made in the Working Paper.79

The Law Commissioners published their conclusions in the First Report on Family Property: A New Approach.80

In this First Report, the Commissioners reversed their former position81 and recommended an expansion of the 1938 Act to give the court the discretionary power to assure that the claim of a surviving spouse upon the family assets should be at least equal to that of a divorced spouse.82 The First Report also recommended statutory co-ownership of the marital home.83 Based on the assumption that Parliament would adopt their recommendations for an expansion of the 1938 Family Provision Act and for statutory co-ownership of the marital home, the Commissioners felt that there was no need for a system of fixed legal rights of inheritance or community of property.84 Not only would the institution of their recommendations as to discretionary distribution and statutory co-ownership sufficiently answer the criticisms of family property law, the Commissioners argued, but the addition of fixed rights of inheritance or community property would serve merely to create confusion and uncertainty as to what a party's property rights really were.85

77. See supra note 76.


81. See supra text accompanying note 65.

82. The Law Commission, First Report on Family Property, supra note 59, paras. 40-41. This conclusion was based on the results of the Commissioners' consultations and surveys, and a recognition of the inherent inequity that a spouse whose behavior may have contributed to a divorce could fare better financially upon dissolution of the marriage than might a surviving spouse, since a testator was in principle free to disinherit his spouse, subject only to the possibility of a successful action being brought by the spouse for the minimal support entitlement allowed under the 1938 Act. See supra text accompanying note 58.

83. Id. at 12-30. "It emerged clearly from the consultation that the principle of co-ownership of the matrimonial home is widely supported both as the best means of reforming the law relating to the home, and as the main principle of family property law." Id. at 21.

84. Id. at 45.

85. Id. at 59.

86. Id. at 44.

The Law Commissioners' detailed final recommendations as to expansion of the 1938 Act were published in their Second Report on Family Property: Family Provision on Death. The recommendations would effect four major changes. First, the court was to award a surviving spouse such provision as the court felt was "a fair or reasonable share of the estate," instead of merely the maintenance which could be awarded under the 1938 Act. The purpose of this provision was to grant the same powers to a court sitting in an inheritance proceeding as were possessed by a court sitting in a divorce matter. Second, the Commissioners recommended expanding the class of entitled applicants to include all children of the decedent — not only those who through age or disability were dependent on the decedent — and all de facto dependants, whether or not related to the decedent.

Third, the Commissioners recommended giving the court broader powers to make financial awards, including the power to order transfers or settlements of property, or to vary ante-nuptial and post-nuptial settlements. Finally, they recommended extending the court's powers of distribution to include both property which had been the subject of any gratuitous inter vivos transfer by the decedent within six years of his death, and property which he had owned jointly with other persons.

The Commissioners submitted their Second Report to Parliament on July 29, 1974. Appended to the Report was a Draft Bill embodying their final recommendations.

B. Parliament

1. House of Lords

The Law Commissioners' Draft Inheritance (Provision for Family and Dependents) Bill was introduced into Parliament on February 13, 1975. The House of Lords simultaneously gave the Bill its First Reading.

88. Id. para. 17.
89. Id. at 14, 16.
90. Id. at 79, 94.
91. Id. at 94.
92. Id. at 115.
93. Id. at 125.
94. Id. at 211, 217.
95. Id. at 141.
96. Id. app. 1. Explanatory notes were included on the page facing each clause. The persuasive authority of these notes was the subject of Parliamentary discussion at 359 Parl. Deb., H.L. (5th ser.) 1102-08 (1975).
99. Id.
The Bill was again considered on March 20, 1975. The Lord Chancellor offered a general explanation of the substantive and policy aspects of the Bill. Several of the Lords commented on the Bill; even those with some doubts welcomed its introduction. After a little over an hour of discussion, the Bill was given its Second Reading and sent to a Committee of the Whole House of Lords.

The House of Lords resolved itself into Committee and considered the Bill on April 24, 1975. The Earl of Mansfield dominated this session, introducing a number of amendments which would have constrained the expansiveness of the reform proposed by the Law Commission. After a debate in which it became clear that there was little support among his colleagues for these amendments, Lord Mansfield withdrew the amendments, and the Bill was reported out of Committee without amendment.

The Bill received its Third Reading in the House of Lords on June 24, 1975. Two technical amendments were offered by the Lord Chancellor. These amendments were adopted without debate, and the Bill was passed without further discussion and sent to the House of Commons.

2. House of Commons

The House of Commons received the Bill from the House of Lords on July 8, 1975, and referred it immediately to a Second Reading Committee. This
Committee met on July 16, 1975.111 At this meeting, the Solicitor-General offered a general explanation of the Bill, and two Members offered suggestions regarding the scope of entitlement to apply for provision under the Bill.112 Agreeing that these suggestions would be considered later,113 the Committee voted to recommend a Second Reading,114 which took place without debate on July 17, 1975.115

The House of Commons again considered the Bill on October 20, 1975.116 The Conservatives offered amendments which would have lessened the sweep of the Act's reforms. They proposed that the Act should not entitle dependants,117 that even an award to a surviving spouse should be limited by a maintenance standard,118 and that a court should have no discretion to vary an ante-nuptial or post-nuptial settlement.119 The proposed amendments were defeated.120 The Solicitor-General moved a Third Reading,121 and a final discussion of the Bill ensued.122 One Member123 offered the parting parry that “[t]he Government are seeking powers in this Bill to deprive an individual of his or her cardinal freedom to choose inheritants.”124 “I see it,” he continued, “as a recipe for monumental family squabbles.”125 Despite his objections, however, the Bill received its Third Reading and was passed without amendment.126

The Bill received the Royal Assent on November 12, 1975,127 and came into

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111. Id. at 1681-94.
112. One Member, Mr. Daniel Awdry of Chippenham, was concerned that the Bill did not entitle those “who maintain or nurse an old person.... In these cases, it is not the survivor who can be described as the dependant [as the Bill would require under § 1(1)(e)] but the deceased.” Id. at 1690. The other Member, Mr. Charles Fletcher-Cooke of Darwen, suggested an amendment to § 1(1)(e) “limiting it to those people who have some sort of ... easily recognizable relationship to the decedent equivalent to a family relationship.” Id. at 1692. He was concerned where the relationship might be distant and secret, involving “no residence, acknowledged link or connection of any sort that might be described as a family connection....” Id.
113. Id. at 1693.
114. Id. at 1694.
115. Id. at 1910.
117. Inheritance Act 1975, supra note 1, § 1(1)(e). See 898 PARL. DEB., H.C. (5th ser.) 170 (1975). The argument was that entitling dependants to apply for provision under the Act would be done at the possible expense of the family and would “thrust[] so much social responsibility [in deciding what is fair and reasonable in complicated situations] on judges. They are neither trained nor equipped to make decisions of this kind.” Id. at 174.
120. 898 PARL. DEB., H.C. (5th ser.) 178, 180, 182 (1975).
121. Id. at 182.
122. Id. at 183-201.
123. Mr. Robert Banks, Conservative Member for Harrogate. Id. at 183.
124. Id.
125. Id. at 184.
126. Id. at 201.
force on April 1, 1976, as the Inheritance (Provision for Family and Dependents) Act 1975.

C. The 1975 Inheritance Act

The 1975 Inheritance Act entitles specified persons to apply for provision from a decedent’s estate. It gives the court reviewing such an application the power to make provision from the estate in disregard of the decedent’s will and of the intestacy laws. The Act leaves the amount of the award to the court’s discretion, but gives the court a list of factors to consider in the exercise of that discretion. The following is a general description of the Act’s provisions.

Section 1 entitles the following classes of persons to apply for “reasonable financial provision” from a decedent’s estate: spouses, former spouses, children, persons whom the decedent “treated . . . as a child of the family,” and persons whom the decedent “maintained, either wholly or partly.” Spouses are entitled to apply for any award of provision “reasonable in all the circumstances.” All other applicants are limited to awards of maintenance.

Section 2 gives the court power to make orders for financial provision out of the estate. Such orders can take the form of periodical payments, lump sum awards, property transfers, or property sales. The court also has the

128. Inheritance Act 1975, supra note 1, § 27(3).
129. Id. § 1(1)(a)-(e). It is important to remember that the Act is triggered only when a complaint is brought by an unhappy would-be legatee. Freedom of testation is restricted only when a successful application is brought.
130. Id. § 2.
131. Id. § 3.
132. The text of sections 1 through 3 of the Act is reproduced in the Appendix to this Comment. Exact quotations from the text are given here only when the explicit language is important to an understanding of the relevant provisions, or where the language has been the subject of dispute in the courts and literature as to its proper construction.
133. Id. § 1(1)(a).
134. Unless they have remarried. Id. § 1(1)(b).
135. Id. § 1(1)(c).
136. Id. § 1(1)(d).
137. Id. § 1(1)(e). The Act provides that
138. If the purposes of subsection (1)(e) above, a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money’s worth towards the reasonable needs of that person.
139. Id. § 1(5).
140. Id. § 1(2)(a).
141. Id. § 1(2)(b). The distinction between maintenance and reasonable provision without regard to need, made in § 1(2)(a) and § 1(2)(b), has existed in English law since the Middle Ages. The right of a child to alimena (basic necessities) was undisputed, but there was authority that the right to legitim (a percentage of the estate) could be denied where the child was capable of self-support. See Helmholz, supra note 13, at 664 n.32, 670.
142. Id. § 2(1)(b).
power to vary any ante-nuptial or post-nuptial agreement, thus making it effectively impossible to contract out of the Act’s reach.\footnote{145}

Section 3 gives the court guidelines to consider in deciding whether to make an award, and if so, in what amount.\footnote{146} The court is directed in Section 3 to consider the following: the financial resources and needs of the applicant;\footnote{147} the financial resources and needs of any other applicant;\footnote{148} the financial resources and needs of the will’s beneficiaries;\footnote{149} the obligations and responsibilities which the decedent had to any applicant or beneficiary;\footnote{150} the size and nature of the net estate;\footnote{151} physical or mental disabilities of any applicant or beneficiary;\footnote{152} and any other matter, including the conduct of the parties, which in the circumstances the court considers relevant.\footnote{153}

In the case of an application by a spouse or former spouse, the court is further directed to consider the applicant’s age,\footnote{154} the duration of the marriage,\footnote{155} and “the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.”\footnote{156} If the applicant is the decedent’s surviving spouse, the court should also consider the provision which a court might have awarded the applicant in a divorce proceeding.\footnote{157}

In applications by children or persons “treated ... as a child of the family,”\footnote{158} the Act directs the court’s attention to a consideration of the applicant’s educational needs.\footnote{159} In the case of applicants whom the deceased “treated ... as a child of the family,”\footnote{160} or who were dependants of the decedent,\footnote{161} the court must consider the extent to which the decedent had assumed responsibility for the applicant’s maintenance.\footnote{162}

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\footnote{145}{Id. § 2(1)(c).}
\footnote{144}{Id. § 2(1)(d).}
\footnote{145}{Id. § 2(1)(f). But see § 15, discussed infra at text accompanying notes 175-76, providing that it is possible at divorce to contract out of the Act’s reach.}
\footnote{146}{Id. § 3.}
\footnote{147}{Id. § 3(1)(a).}
\footnote{148}{Id. § 3(1)(b).}
\footnote{149}{Id. § 3(1)(c).}
\footnote{150}{Id. § 3(1)(d).}
\footnote{151}{Id. § 3(1)(e).}
\footnote{152}{Id. § 3(1)(f).}
\footnote{153}{Id. § 3(1)(g).}
\footnote{154}{Id. § 3(2)(a).}
\footnote{155}{Id.}
\footnote{156}{Id. § 3(2)(b).}
\footnote{157}{Id. § 3(2).}
\footnote{158}{Id. § 1(1)(d).}
\footnote{159}{Id. § 3(3).}
\footnote{160}{Id. § 1(1)(d).}
\footnote{161}{Id. § 1(1)(e).}
\footnote{162}{Id. § 3(3)(a), and § 3(4). If the applicant claims to have been “treated ... as a child of the family” under § 1(1)(d), the court must also consider whether the decedent knew the applicant was not his own child, and whether anyone else might be liable for the applicant’s maintenance. Id. § 3(3)(b), (c).}
Section 4 imposes a time-limit of six months, from the date on which “representation with respect to the estate of the deceased” is taken, on all applications.\footnote{163} The court is given the power to disregard the time-limit, although no suggested justifications for doing so are stated.\footnote{164}

Section 5 provides the court with the power to make an interim order of provision from the estate in the case of an applicant in urgent need of financial assistance.

Section 6 allows for the variation, suspension, or discharge of periodical payments previously ordered under section 2,\footnote{165} in the case of changed circumstances.\footnote{166} In altering the original order, the court is to consider the same factors listed in section 3, pertinent to the original application.\footnote{167} Orders made for lump sum payments or property transfers are not subject to subsequent variation, suspension, or discharge.\footnote{168}

Section 7 gives the court power to order that lump sum payments be made in installments,\footnote{169} and provides that the timing and amount of the installments may subsequently be varied.\footnote{170}

Sections 8 and 9 include in the decedent’s net estate subject to distribution, gifts \textit{causa mortis}\footnote{171} and the decedent’s severable share of property held in joint tenancy.\footnote{172}

Sections 10 through 13 give the court the power to recall property which the decedent had transferred without full valuable consideration, and with the intention of defeating applications for family provision, if the transaction occurred within six years of the decedent’s death.\footnote{173} Section 11 provides that contracts to leave property or money by will may also be set aside if made without consideration and with the intention of defeating applications under the Act.

Sections 14 through 18 apply in cases where the applicant is a separated or divorced spouse of the decedent. Section 14 gives the court discretion to disregard any decree of divorce or judicial separation made absolute less than twelve months prior to the decedent’s death. This would allow a former spouse to apply in such cases as a spouse, thus entitling the former spouse to more than a simple maintenance award.\footnote{174} Section 15 gives divorce courts authority to incorporate

\begin{footnotes}
\item[163] Id. § 4.
\item[164] Id.
\item[165] Id. § 2(1)(a).
\item[166] Id. § 6(7).
\item[167] Id.
\item[169] Id. § 7(1).
\item[170] Id. § 7(2).
\item[171] Id. § 8.
\item[172] Id. § 9.
\item[173] For a commentary on section 10, purporting to identify likely problems and propose solutions, see Sherrin, \textit{Defeating the Dependents}, 1978 \textit{Conveyancer} 13.
\item[174] That is, the applicant could apply under § 1(1)(a) rather than § 1(1)(b).
\end{footnotes}
into their decrees agreements that neither party will apply for family provision on the death of the other. 175 This section also requires that courts not entertain applications for family provision from persons subject to such an incorporated agreement. 176 Sections 16, 17, and 18 enable the court to review the provisions of a maintenance or property settlement agreement in force as part of a decree of divorce or judicial separation at the time of the decedent’s death.

Sections 19 through 26 are supplementary, dealing with the effect of orders, 177 personal representatives, 178 evidentiary matters, 179 definitions, 180 and the effect of the Act on existing legislation. 181 Section 27 is the enacting section.

The 1975 Act is a detailed attempt to make English inheritance law more responsive to the variety and complexity of modern economic and social conditions. The courts are empowered to make individualized awards of provision from decedents’ estates, and are directed to have regard for the complexity and uniqueness of each applicant’s situation. Whether the Act has been successful in achieving these goals will be examined in the next section.

V. CASES BROUGHT UNDER THE 1975 ACT: AN ANALYSIS OF JUDICIAL ATTITUDES

Since the 1975 Act went into effect on April 1, 1976, there have been fewer than forty reported cases decided under the Act. 182 While it is difficult to estimate the number of unreported applications under the Act, these reported opinions may give some indication of the judicial attitudes towards applicants. 183

Three judicial attitudes that find repeated expression in the reported cases call into question the effectiveness of the Act as a protective device. First, freedom of testation remains the standard by which courts judge a decedent’s provision for his survivors as to its “reasonable[ness] in all the circumstances.” 184 Second, courts have expressed concern that the Act may encourage family squabbles, and as a result some decisions tend to narrow the scope of the Act’s entitlements in order to exclude certain applicants. 185 Third, the courts have explicitly discour-

175. Id. § 15(1).
176. Id. § 15(3), (4).
177. Id. § 19.
178. Id. § 20.
179. Id. § 21.
180. Id. §§ 23, 25.
181. Id. §§ 24, 26.
182. This figure corresponds roughly to the rate at which cases were brought in the initial years after the 1938 Act became effective. By 1943, there were eleven reported cases. Unger, supra note 37, at 226, 227 n.55.
183. This analysis is not an exhaustive catalogue of all cases brought thus far, nor does it attempt to point out all trends worthy of note. It simply notes several trends which may be of particular interest to those who might see in the English system a remedy for defects they perceive in American law.
185. See infra text accompanying notes 243-50.
aged litigation, especially as to small estates, because of the costs involved.\textsuperscript{186} A. The Policy of Freedom of Testation

The court, according to the 1975 Act, must ask whether a testator's provision for an applicant was “reasonable in all the circumstances.”\textsuperscript{187} One of those circumstances seems to be the long history of,\textsuperscript{188} and lingering predilection for,\textsuperscript{189} testamentary freedom in England, of which the courts feel compelled to take note. “Subject to the court's powers under the 1975 Act and to fiscal demands,” said the court in \textit{In re Coventry, decd.}, \textsuperscript{190} “an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases, or, if he chooses to do so, to leave that disposition to be regulated by the laws of intestate succession.”\textsuperscript{191}

\textit{In re Coventry, decd.} involved an application by a son against a father's estate. The decedent had married in 1927 and bought a house.\textsuperscript{192} In 1931 his only child, the applicant son, was born.\textsuperscript{193} In 1957 the son, then aged 26, returned to live at home, and his mother left her husband.\textsuperscript{194} After his wife left, the decedent contributed nothing to her support.\textsuperscript{195} The son worked full-time and lived rent-free with his father in exchange for doing domestic work and buying the food.\textsuperscript{196} In 1961 the son married, and his wife moved in, assuming the household responsibilities.\textsuperscript{197} They had three children; in 1975, however, she left and took the children.\textsuperscript{198} One year later, in 1976, the father died, without leaving a will.\textsuperscript{199} Under the intestacy rules, his wife was entitled to his entire estate, which consisted of his two-thirds interest in the house, valued at £7,000.\textsuperscript{200} The wife was 74.

\textsuperscript{186} See infra text accompanying notes 251-66.
\textsuperscript{187} Inheritance Act 1975, supra note 1, § 1(2)(a), (b).
\textsuperscript{188} See supra, text accompanying notes 23-27.
\textsuperscript{189} Re Chatterton, 1980 CONVEYANCER 152. “The decision is perhaps some consolation to those who feel that the Act is too easily capable of destroying the testamentary wishes of the deceased.” Id. See also Cadwallader, A Mistresses' Charter?, 1982 CONVEYANCER 46, 57:

To those guardians of individual liberty to whom any interference with a man's right to dispose of his wealth as he wishes is an anathema, it can be said that a qualified respect for testamentary freedom seems to be emerging under the new Act. Although, oddly, the deceased's intentions and reasons for his dispositions are not to be found among the factors to which the court's attention is specifically directed under section 3, they are nevertheless receiving no little consideration in court. . . .
\textsuperscript{190} [1980] 1 Ch. 461.
\textsuperscript{191} Id. at 474.
\textsuperscript{192} Id. at 466.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 467.
\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{199} Id. at 464.
\textsuperscript{200} Intestates' Estates Act, 1952, supra note 45. The wife already retained the outstanding one-third interest. \textit{In re Coventry, decd.}, [1980] 1 Ch. 461, 464-65.
and lived on her state pension in a subsidized apartment. 201 The son, 46, earned £52 a week take-home pay, but was under an obligation to pay £12 a week in support to his wife and children. 202

The son applied under § 2 of the 1975 Act, claiming that the intestacy law did not make reasonable financial provision for his maintenance. 203 The master in charge of the estate awarded the son £2,000 on the basis of his original application. 204 The son appealed to the trial court, which reversed the master's award and left the son with nothing. 205 In considering the son's financial resources as directed by the Act, 206 the court concluded that he was able to provide for himself. The court reasoned that since the father was under no moral obligation to the son, the application must fail. 207 Whether the court's decision turned more on its conclusion that the son was not in need, or on a respect for the father's testamentary freedom, is thrown into question by the court's assertion that it was not entitled by the Act "to interfere with a deceased person's dispositions simply because a qualified applicant feels in need of financial assistance." 208 In approving the trial court's analysis, the Court of Appeal held that the question to be answered "is not whether it might have been reasonable for the deceased to assist his son . . . but whether in all the circumstances, looked at objectively, it is unreasonable that the effective provisions governing the estate did not do so." 209

The result in In re Coventry, decd. is not entirely self-evident, and the court's analysis raises the question of what the result would have been had the son been left the father's two-thirds interest in the house by will, and the mother were the applicant. The father, having left a will, would have made an even clearer expression of his wishes. Under the In re Coventry, decd. reasoning the court might hold that it was not unreasonable in all the circumstances for the father to have left the son everything, and the wife nothing. The son, after all, had been living with the father, helping out around the house and buying the food for twenty years. On the other hand, the father had not provided for his wife at all during those years. "Was it unreasonable that the decedent chose to continue the pattern in his will?" the court might ask.

The respect for testamentary freedom shown in In re Coventry, decd. was

202. Id. at 467.
203. Id. at 464.
204. Id. at 462.
205. Id. at 478.
206. Inheritance Act 1975, supra note 1, § 3(1)(a).
209. Id. at 488. This is also the approach which had been taken by most courts under the 1938 legislation, following Re Brownbridge, [1942] 193 L.T. J. 185. See Unger, supra note 37, at 224 n.42. It should be noted that while the statute seeks to ensure "reasonable financial provision," § 1(1), this judicial approach asks whether the provision made was unreasonable.
followed explicitly in *Legat v. Ryder*. They were divorced in 1968, but remained somewhat friendly. The plaintiff ran a hotel after the divorce, and she gave her former husband lodging there for a while. In 1973 the decedent moved in with another woman, who became his de facto wife. He died in 1977, leaving a net estate of £20,000 to his cohabitant. His former wife applied under § 1(1)(b) of the 1975 Act, claiming that her former husband's will had not made reasonable provision for her maintenance. She asked for a lump sum award of £4,000-5,000. The lawyers for the estate suggested that £2,000 would be an appropriate award. Despite even this agreement of the estate's attorneys that the decedent's former wife was entitled to provision under the Act, the court refused her application. The court found that it was "not . . . unreasonable" for the decedent to leave nothing to his former wife. The court expressed the view that "[t]he object of the Act is not to award [the applicant] a legacy . . . ."

Cases in which courts have been willing to override the provisions of a will have usually involved circumstances in which a particularly large estate was involved, with a consequent abundance of funds available for distribution; where a diversion of the funds would not adversely affect the named beneficiaries, since they were not in need; or where it was shown that the will did not correspond to the true intentions of the decedent.

Thus in *Re Besterman's Will Trusts* the court awarded a widow £378,000 out of an estate of £1.5 million. She had been married to the decedent for the last sixteen years of his life, until he died at the age of 71. He left her his personal chattels and £3,000 a year; the rest of his £1.5 million estate went to Oxford University.

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211. Id.
212. Id.
213. Id.
214. Id.
215. Id.
216. Id.
217. Id.
218. Id.
219. Id.
220. Id.
221. Id.
222. Id.
227. Id.
228. Id.
University and the British Museum to continue his literary research. The trial court awarded the widow £259,000 and the appellate court increased the award to £378,000. The court noted that Mr. Besterman left no other relatives. Moreover, the named beneficiaries of the will, Oxford University and the British Museum, certainly did not stand in need. The court also noted the large size of Mr. Besterman’s estate. Furthermore, it appeared to the court that the decedent thought he was being more generous to his widow than was in fact the case. After considering all these factors, the court felt justified in overriding the provisions of the will. In so doing, however, the court cautioned against applying the logic it used to other cases, especially those involving smaller estates. The court noted that “[t]his is a very ‘pure’ case, . . . virtually free from any complicating factors. . . . [I]t would be a pity if this case should be used as a basis for drawing general deductions of principle.”

Malone v. Harrison also involved a very large estate, valued at £480,000 after taxes. The decedent had left his de facto wife and her son a considerable legacy, and had left his brother shares of stock worth £192,000. The decedent’s mistress applied for provision from the estate under the 1975 Act. In awarding the mistress provision, the court ordered that the £19,000 award be taken from the brother’s portion, reducing it by only ten percent and still leaving him with £173,000. Here again, although the court was willing to interfere to a

229. Id. Mr. Besterman was a devotee of the Enlightenment and apparently considered himself the reincarnation of Voltaire! B. HOGGETT & D. PEARL, THE FAMILY, LAW AND SOCIETY 135 (1983).
232. The court noted that Mrs. Besterman was “the only person to whom it could be said that the deceased owed any duty to make provision.” Id. Nor was marital conduct at issue. “The plaintiff,” said the court, “was a faithful and dutiful wife to whom the deceased owed all the duties ordinarily arising from the married state.” Id.
233. Id.
234. “The deceased was not just a wealthy man,” said the court. “He was a very wealthy man and that is an important factor to be borne in mind in considering what is a reasonable provision for his widow.” Id.
235. Mr. Besterman had ordered his executors “to treat her as generously as possible.” Id. The court speculated that he had so far lost touch with the real value of money as not to appreciate the reality of her needs. That is a phenomenon not uncommonly associated with advancing age, particularly in an era of rapidly changing money values. The income which he left her was approximately equal to the housekeeping allowance which he had been accustomed to give her and it looks . . . as if he may have assumed that she would simply go on living at [their home] during her widowhood in exactly the same style and manner as she had during his lifetime, but without appreciating that he had left her no endowment to enable her to do so.
236. Id.
238. Id. at 1354.
239. Id. at 1362.
240. Id. at 1354.
241. Id. at 1366.
small extent with the decedent's freedom of testation, it was able to do so without appreciably affecting either the beneficiaries or the decedent's chosen pattern of distribution. 242

These cases indicate that the courts have read into the Act a respect for the decedent's wishes, thus making testamentary freedom the standard by which to judge a decedent's provision for his survivors. Courts generally disregard the decedent's expressed intentions only in cases involving large estates, with an abundance of funds available for distribution; where the named beneficiaries do not stand in need; or where the will did not correspond to the decedent's true intentions.

B. The Privacy of Family Affairs

Since the Act entitles nearly all family members to apply for provision out of a decedent's estate, some members of Parliament feared that the Act would provide "a recipe for monumental family squabbles." 243 A survey of the cases reported thus far indicates that this fear may have been justified. In In re Coventry, decd. 244 for example, a son applied for provision out of his father's estate; the defending beneficiary was his mother. In Re Dennis, 245 a son challenged dispositions by his father to his mother and to his own children. In In re Christie, decd. 246 a son asked the court to set aside a disposition to his sister. 247 Of course, the Act by its very nature implies that challenges to a testator's plans will for the most part be intra-family challenges, since most of a testator's likely beneficiaries, as well as those persons entitled to apply under the Act, are family members.

According to one commentator, 248 some courts are acting to mitigate this tendency of the Act to encourage family strife, by imposing a requirement that an applicant for provision from a decedent's estate show that the decedent had assumed responsibility for him or had a moral obligation to provide for him. 249

242. The court in another case made an award to the decedent's former wife because it left the other beneficiaries "largely . . . unaffected." Re Crawford, [1982] 4 F.L.R. 273 (available on LEXIS, Enggen library, Cases file).

243. See supra text accompanying note 125.

244. [1980] 1 Ch. 461.


246. [1979] 1 Ch. 168.

247. See also, e.g., Re C, decd., 123 SOLIC. J. 35 (1979) (decedent's de facto wife and son versus another son of decedent); In re Fullard, decd., 1982 Fam. 42 (former wife versus widow); Re Crawford, [1982] 4 F.L.R. 273 (available on LEXIS, Enggen library, Cases file) (former wife versus widow); Malone v. Harrison, [1979] 1 W.L.R. 1353 (mistress versus wife, de facto son, and brother); Re Kirby, [1981] 3 F.L.R. 249 (available on LEXIS, Enggen library, Cases file) (de facto husband of 35 years versus decedent's children by former marriage); Re Viner, [1978] C.L.Y. 5091 (sister versus sister).

248. Cadwallader, supra note 189, at 46.

249. Id. at 57-58. See, e.g., Re Haig, decd., 76 L. Soc'y GAZ. 476 (1979); In re Christie, decd., [1979] 1 Ch. 168. The Act directs only that the court, in the exercise of its discretion, "have regard to whether the deceased had assumed any responsibility for the applicant's maintenance." Inheritance Act 1975, supra
This requirement has the effect of withholding standing to apply from many potential applicants, notably adult children and others whom a court might say were adequately capable of maintaining themselves. With standing thus restricted, and the scope of the Act’s entitlements correspondingly narrowed, the likelihood of family strife caused by applications is also reduced.

C. Costs of Litigation

In addition to being concerned with preserving testamentary freedom and avoiding the encouragement of family strife, the English appellate judiciary who have heard cases arising under the 1975 Act have expressed concern with the costs of litigation. A person who feels unjustly left out of a testator’s munificence — runs the logic — must get a lawyer and bring an application for provision under the Act. The beneficiary named under the will or intestacy statute will probably also hire a lawyer to contest the application. Both sides may spend a lot of money on lawyers. The purpose of a Family Provision Act such as this is to distribute money to the deserving family and dependants, not to lawyers. The more the parties spend on litigation, the less they will have left for themselves.

The judiciary have responded to their concern about costs by explicitly discouraging litigation, especially in cases involving small estates. In In re Coventry, *decid.* the entire estate consisted of a decedent’s two-thirds’ interest in a house, valued at £7,000. The two-thirds interest passed by the intestacy statute to the decedent’s wife, and his son applied under the Act. The master who initially heard the case awarded the son £2,000. The son took an appeal. The appellate court reversed, leaving the applicant with nothing. Although the court’s opinion spoke of testamentary freedom and family-strife concerns, the court was also plainly worried about the litigation costs involved:

[i]t was reasonable for this plaintiff to receive nothing and for the mother . . . to receive whatever was left after all this litigation had been paid for . . . Particularly in the case of small estates such as this

note 1, § 3(3)(a). Furthermore, the court is directed to consider such an assumption of responsibility in the case only of an application by a person whom the deceased “treated . . . as a child” under § 1(1)(d), or by a dependant under § 1(1)(e). See supra text accompanying notes 160-62.

250. Cadwallader, supra note 189, at 57-58.
251. See, e.g., the sentiment expressed by the Court of Appeal in Allcorn v. Harvey, C.A. (March 25, 1980) (available on LEXIS, Enggen library, Cases file), that “this is another case where the family have become embroiled in disastrous litigation, out of which no-one are the beneficiaries except perhaps the lawyers.”
253. Id. at 464-65.
254. Id.
255. Id. at 462.
256. Id. at 474. See supra text accompanying notes 190-209.
257. Id. at 482.
one, appeals ... are strongly to be discouraged. ... I regard it as little short of disastrous that the plaintiff was advised to contest the master's order in this case. 258

Such language is directed at the lawyers. One commentator has suggested that lawyers now obtain written consent from a client who insists on pressing a doubtful claim, after advising the client and warning of the consequences. 259 The lawyer who fails to advise and warn is likely to be subject to a negligence action based on the language of In re Coventry, decd. 260

The approach of In re Coventry, decd. was followed in Jelley v. Iliffe, 261 Re Kirby, 262 and In re Fullard, decd. 263 In each case the court deplored the pressing of claims against small estates, because of the costs to the litigants, 264 and approved the practice of simply dismissing such claims on the pleadings as stating no reasonable cause of action, for the explicit purpose of saving the estate from the impact of legal costs. 265

Thus the courts seem to agree with Mr. Banks' comment during the Commons' debates in 1975, that the Act is "a recipe for monumental family squabbles. ... laid by the Law Commission, hatched by the Solicitor-General, and ... presented for a lawyers' feast." 266 The judiciary have reacted by explicitly discouraging litigation, telling lawyers that pressing a doubtful claim may lead to liability for negligence, at least in the absence of the client's informed consent, or even striking claims on the pleadings as showing no reasonable cause of action.

The reported cases of the first eight years' practice under the 1975 Inheritance Act indicate that applications may be thwarted or discouraged by judicial attitudes about testamentary freedom, the privacy of family affairs, and the costs of litigation. 267 However justified these attitudes may or may not be, 268 they do

258. Id. at 492.
260. Id.
261. 1981 Fam. 128.
263. 1982 Fam. 42.
264. Jelley v. Iliffe, 1981 Fam. 128, 138; Re Kirby, [1981] 3 F.L.R. 249 (available on LEXIS, Enggen library, Cases file) ("[Striking the claim unless it has a real chance of success] may be the only way in which an estate of limited value may be preserved from the impact of legal costs which otherwise would obliterate it."); In re Fullard, decd., 1982 Fam. 42, 46 ("Where the estate ... is small, the onus on an applicant of satisfying the conditions of section 2 is very heavy indeed and these applications ought not to be launched unless there is (or there appears to be) a real chance of success, because the result of these proceedings simply diminishes the estate and is a great hardship on the beneficiaries if they are ultimately successful in litigation.").
266. 898 PARL. DEB., H.C. (5th ser.) 184 (1975).
267. An additional factor which may discourage a potential applicant is judicial uncertainty about the proper statutory construction of some of the Act's provisions. For example, § 3(2), providing that in deciding what if any award to make, a court should consider what the applicant would have gotten on
call into question the effectiveness of the Act to provide "reasonable" testamentary disposition to the family and dependants of a testator. A client who is discouraged from bringing an application against an estate because of these judicial attitudes and the attendant uncertainty of results, has nowhere left to turn. He is left out of the will by the decedent, and is forced out of the system by the courts.

VI. FAMILY-ORIENTED PROTECTIVE DEVICES IN AMERICAN SUCCESSION LAW

A. Protective Devices in American Law

The American colonists brought with them the English succession law of their times. This included dower and the legitim, the latter in the form of an indefeasible share protected for the surviving spouse only. Some states subsequently added a homestead allowance, or a support allowance to which the surviving spouse was entitled during administration of the estate. Dower, the indefeasible share, homestead allowance, and support allowance took on varying local characteristics as they were adopted either judicially or by statute, and

divorce, has been called by one court "a further imponderable added to a list of imponderables." Re Besterman's Will Trusts, C.A., 1977 B. No. 5319 (Oct. 18, 1982) (available on LEXIS, Enggen library, Cases file). Litigation in many cases over the proper construction of such statutory terms as "reasonable provision," "substantial contribution," "maintenance," and "consideration," prompted another court to complain that

[t]his Act was designed to deal with a comparatively simple situation, and it is in danger of becoming a mass of technicalities. In my judgment this is very unfortunate and undesirable. The Act itself ... is quite simple. ... It ought to be possible to arrive at a conclusion without getting involved in a mass of legal technicalities and complicated questions of construction. ... It would be a pity, in my judgment, if litigation in these comparatively small estates should be encouraged by undue attention being paid to technical questions of construction.


268. See, e.g., the discussion of costs, infra text accompanying notes 299-304.
269. Simes, supra note 2, at 15.
271. The homestead exemption seeks to assure a permanent common home to members of a family by setting apart property belonging to the head of a family, up to a stated amount, and immunizing this property from the claims of general creditors and from the misfortunes or improvidence of the person who is head of the family.

R. POWELL, REAL PROPERTY, para. 268 (Rohan ed. 1968). The homestead laws operate to protect a surviving spouse's claim to the property not only against creditors but also against contrary testamentary dispositions. Id.; see generally Haskins, Homestead Rights of a Surviving Spouse, 37 IOWA L. REV. 36 (1951).
272. Dower was generally received from the common law, while the forced share came about by statute. Haskins, The Development of Common Law Dower, 62 HARV. L. REV. 42, 55 (1948). Common-law dower was often made statutory, however, and there is authority for the proposition that some forced-share statutes as well were merely statements of a rule that existed in those states at common law. See Collins v. Garman, 5 Md. 503 (1854); THE BODY OF LIBERTIES 1641, at para. 79, reprinted in THE
have undergone change in some respects. These devices have nonetheless retained certain shared features in all jurisdictions.

Three of these shared features stand American succession law in marked contrast to the post-1975 English system. First, an American court has no discretion to vary the amount of protection afforded a claimant under these doctrines. Second, the surviving spouse is the only family member who is granted protection: children may be easily disinherited, and no protection is afforded de facto dependants. For the surviving spouse who has been disinherited, however, the American system works quite simply: he or she need simply claim the entitlements reserved by the above protective devices.

B. Defects of the American System

The devices available in most American states which automatically entitle a surviving spouse to certain fixed property rights in a decedent's estate have the advantage of providing the survivor with relatively certain results at little or no cost. Nonetheless, commentators have criticized the American system for several failings. First, the surviving spouse's share may be vulnerable to defeat by inter vivos transfer. Second, a spouse who claims against the will may derail a plan by the testator to provide for his other dependants in the will, having adequately provided for his spouse in other ways. Third, the American system fails to


273. Dower, for instance, has been either abolished or substantially modified by legislation in all but eight states.

274. The only discretion which a court may exercise is in the determination of the support allowance for the surviving spouse during administration of the estate. Rheinstein & Glendon, Interspousal Relations, in 4 International Encyclopedia of Comparative Law, Persons and Family 142-43 (1980).


276. The American protective devices were originally intended to protect the surviving wife, since generally she stood more in need of protection than a surviving husband, in whose name property was assumed to be held. Curtesy was a modified form of dower right which vested in the husband at his wife's death, but only when a live child had been born to the marriage. See generally Haskins, Curtesy in the United States, 100 U. Pa. L. Rev. 196 (1951). Where dower still exists, curtesy has been retained (although it is frequently called dower) for the husband, and has taken on the characteristics of dower. The forced share, homestead exemption, and support allowance laws are now held to entitle husbands as well as wives to protection. See Rheinstein & Glendon, Interspousal Relations, supra note 274, at 139 n.743.

277. See generally Macdonald, Fraud on the Widow's Share (1960). Attempts to solve this problem have been made by the Uniform Probate Code art. II pt. 2, 8 U.L.A. 281 (1969), and similar statutes adopted in some states. Rheinstein & Glendon, Interspousal Relations, supra note 274, at 140-41. Rheinstein & Glendon cite Sandien v. Sandien, 496 P.2d 565 (Okla. 1972) and Montgomery v. Michaels, 54 Ill.2d 552, 301 N.E.2d 465 (Ill. 1973), as evidence of judicial efforts to alleviate the problem in yet other states. Id. at 141.

Fourth, the American system can produce results that seem out of harmony with the flexible division of property under modern divorce laws, as did the pre-1975 English system. Finally, the current American statutory scheme typically makes no allowance for the problems presented by recent trends in family behavior, such as increases in serial marriage and cohabitation.

Thus the fixed nature of the survivors' property rights in a decedent's estate is the source of the American system's greatest advantages, predictability and low costs of administration. At the same time, these fixed rights are responsible for the system's flaws, chiefly those which result from an inability to take into account the equities of an individual situation.

VII. JUDICIAL DISCRETION AS A REMEDY FOR DEFECTS PERCEIVED IN THE AMERICAN SYSTEM

Some proponents of reform have advocated the adoption of English-style judicial discretion in estate distribution as a remedy for the failings they perceive in the American system. A judge with discretionary powers could in theory set aside transfers made in fraud of survivors' shares. Under such a system, a court could also take into account provision made by the testator in other forms which should be set off against a survivor's share. A court with wide discretion could also wield its powers to ensure that a surviving spouse were treated as benevolently as a divorced one, or that the survivors most in need were those who benefitted most. Finally, powers of discretion could enable a court to consider the actual family behavior of the decedent, in appropriate cases making allowances for spouses and children of former marriages, cohabitants, needy parents, or other dependants.

The 1975 English legislation itself explicitly attempts to avoid the problems of insensitivity to the individual situation which can be ascribed to the American statutory forced-share system. Aside from its shortcomings in practice, how-

279. Except in Louisiana, the surviving spouse is the only party (other than a creditor) afforded any meaningful protection from disinheretance by current American practices. See La. Civ. Code Ann. arts. 1493-95, 1617-24 (West 1952). Reform proposals have advocated expanding protection to include children and parents in need. See Haskell, The Power of Disinheritance: Proposal for Reform, 52 Geo. L.J. 499 (1964); Simes, supra note 2, at 29-30; Cahn, Restraints on Disinheritance, 85 U. Pa. L. Rev. 139 (1936); Macdonald, supra note 277, at 299-327. Children and parents in need are entitled to apply for maintenance under the English Inheritance Act of 1975, § 1(1)(c) and (e), as they were under the original New Zealand act. See Laufer, Flexible Restraints on Testamentary Freedom - A Report on Decedents' Family Maintenance Legislation, 69 Harv. L. Rev. 277, 282-83 (1955).

280. Because the courts possess discretionary powers of property distribution under modern divorce laws, it is quite possible, for instance, that a spouse whose unfaithful behavior led to a divorce could be awarded a greater share of the marital assets than the faithful surviving spouse of a long-term marriage who inherits under a forced-share statute.

281. See, e.g., Laufer, supra note 279, at 314; Macdonald, supra note 277, at 299-327.

282. Inheritance Act 1975, supra note 1, § 10 (inter vivos transfers); § 3(1) (directing the court to
ever, the English system may not be adaptable to American succession practice for several other reasons. First, discretionary distribution on divorce has produced dissatisfaction among litigants and in practice has revealed its defects both in England and in the United States. Second, different judicial traditions make the entrusting of estate distribution to judges more problematic in the United States than in England. Third, the English "loser pays" rule, which may facilitate the workings of the Act in England, is not followed in the United States.

Judicial discretion to distribute property between spouses at divorce has been adopted in recent years in all common-law states in the United States, as well as in England. The discretionary system of property distribution on divorce, however, has produced dissatisfaction among litigants and in practice has revealed defects both in England and in the United States. Critics claim that the system of discretionary distribution leads to acrimony among parties who might otherwise have been able to settle their property-division matters without strife, and that the system is expensive both in terms of the litigants' own counsel fees and in terms of court time. Noting these problems, recent commentators have proposed a retreat from absolute discretion as the method of property distribution on divorce.

consider a testator's other dispositions to the beneficiary and applicant); § 1 (entitling children and de facto dependants, including needy parents, to apply for provision); § 3(2) (directing the court to consider what an applicant would have gotten on divorce); and § 3(1)(g) (general discretionary power to account for the individual situation).

283. See supra text accompanying notes 182-268.
284. See infra text accompanying notes 287-94.
285. See infra text accompanying note 298.
286. See infra text accompanying notes 299-304.
287. Freed, Equitable Distribution as of December 1982, 9 Fam. L. Rep. (BNA) 4001 (1983); Mississippi and West Virginia, which at the time of Freed's December 1982 survey had not yet adopted equitable distribution, have apparently done so since that time. See Reeves v. Reeves, 410 So.2d 1300 (Miss. 1982); LaRue v. LaRue, 304 S.E.2d 312 (W.Va. 1983); Oldham, Is the Concept of Marital Property Outdated?, 22 J. Fam. L. 263, 263 n.1 (1983-84).
288. Matrimonial Causes (Property and Maintenance) Act, 1958, 6 & 7 Eliz. 2, ch. 35.
291. See Glendon, Property Rights Upon Dissolution of Marriages and Informal Unions, supra note 289, at 250; Oldham, supra note 287, at 268, 293, 300; Note, Equitable Distribution vs. Fixed Rules, supra note 290, at 776.
292. See Glendon, Property Rights Upon Dissolution of Marriages and Informal Unions, supra note 289, at 251-53; Oldham, supra note 287, at 268; Note, Equitable Distribution vs. Fixed Rules, supra note 290, at 773-78.
293. See Oldham, supra note 287, at 288; Note, Equitable Distribution vs. Fixed Rules, supra note 290, at 776.
294. See, e.g., K. Gray, Reallocation of Property on Divorce 68-115 (1977); Glendon, Property
These same criticisms apply with equal force to the discretionary system of estate distribution embodied in the English Inheritance Act of 1975. Indeed, the English judiciary have recognized the tendency of the Act to encourage family strife and its expense to litigants. In an attempt to cope with these problems, they have arguably limited the effectiveness of the Act.

Differences perceived in the proper role for the judiciary may also pose discouragement for plans which would entrust American judges with discretion in the distribution of estates. The English judiciary have a long history of traditions in the exercise of discretion which vary in significant respects from the traditions of their American counterparts. Even proponents of reform have recognized the different judicial traditions as a barrier to the adoption of judicial discretion in this area, and have been unwilling to recommend that American judges be vested with discretion in estate distribution.

In English practice, a court may order the unsuccessful party to bear both sides' costs of litigation. This "loser pays" rule may have the effects of discouraging patently unfounded litigation and preserving the successful party's

Rights Upon Dissolution of Marriages and Informal Unions, supra note 289, at 256-58; Note, Equitable Distribution vs. Fixed Rules, supra note 290, at 767-78.

295. See supra text accompanying notes 243-50.

296. See supra text accompanying notes 251-66.

297. See supra text accompanying notes 248-50, 264-68.

298. Fratcher, supra note 36, at 1058; Browder, supra note 278, at 1307; Chaffin, Protection of the Surviving Spouse, in COMPARATIVE PROBATE LAW STUDIES 187, 195-96 (1976).

299. Supreme Court Act, 1981, ch. 54, § 51(1); Rules of the Supreme Court, Order 62, rule 5(2). The classic study of the English rule is Goodhart, Costs, 38 YALE L.J. 849 (1929). For an excellent recent study of the "loser pays" rule in various European systems (including England), see Pfennigstorf, The European Experience with Attorney Fee Shifting, 47 LAW & CONTEMPORARY PROBLEMS 37 (1984). In practice, the costs of any reasonable claim or resistance may be ordered paid out of the estate. This is a limited exception to the "loser pays" rule, and is applicable only in probate actions. Goodhart, supra at 868; 2 F. POLLOCK & F. MAITLAND, supra note 15, at 597. See also Re Wood, Chancery Division (April 2, 1982) (available on LEXIS, Enggen library, Cases file). When such an order to pay costs out of the estate is made, it not only decreases the successful party's share in the estate (where the entire estate is at issue), but may encourage any other litigation (in other cases) that is arguably reasonable. This result seems even more questionable than the American pattern of cost distribution, since the winner may end up paying not only his own costs of litigation but those of his opponent — at least where the entire estate is at issue, and the costs are thus to be taken from the winner's "share." The Court of Appeal recognized this problem in In re Fullard, dec'd., 1982 Fam. 42. The court stated that where the estate is a small one the onus on an applicant of satisfying the conditions of section 2 is very heavy indeed and these applications ought not to be launched unless there is (or there appears to be) a real chance of success, because the result of these proceedings simply diminishes the estate and is a great hardship on the beneficiaries if they are ultimately successful in litigation. For that reason I would be disposed to think that judges should reconsider the practice of ordering the costs of both sides in these cases to be paid out of the estate. That is probate practice; this is something quite different. I think judges should look very closely indeed at the merits of each application before ordering that the estate pays the applicant's costs if the application is unsuccessful.

Id. at 46.

300. In the cases of applications brought under the 1975 Inheritance Act, courts seem to have been applying the traditional exception to the "loser pays" rule, ordering costs to be paid out of the estate. The rule has therefore had presumably little discouraging effect on litigation. See supra text accompanying notes 251-66. Following the Court of Appeal's recommendation in In re Fullard, dec'd., 1982 Fam. 42, 46, however, the courts may begin to apply the rule to cases brought under the Act. See supra note 299.
share of an estate. 301

In America, each party traditionally pays its own costs of litigation. 302 If survivors had to bring lawsuits to recover provision from an estate, as under the English system, the successful party's share would necessarily be reduced by the costs of litigating his side of the dispute. That the costs may be considerable is apparent from the English experience 303 and the experience with discretionary property distribution on divorce. 304 The legal fees generated by a complex and protracted contest could thus considerably deplete even a medium-sized estate. If the purpose of restrictions on testamentary freedom is family provision, as it is in England, then a procedure which results in the depletion of an estate by legal fees seems inappropriate. Thus the absence of a "loser pays" rule to discourage excessive litigation and preserve the taker's share may militate against any system of family-protection devices which requires, as does the current English system, the bringing of a lawsuit.

Given these considerations, it is far from clear that whatever stands to be gained from the adoption of the discretionary method of estate distribution would not be outweighed by the loss of the fixed-share system's advantages of predictability and low cost.

VIII. CONCLUSION

The 1975 English Inheritance Act is a detailed attempt to provide family protection from disinheritance. In order to take account of the complexity and variety of modern English social and economic life, the Act gives judges discretion to make "reasonable financial provision" out of a decedent's estate for family and de facto dependants. The Act thus makes it theoretically possible to arrive at the most equitable distribution in each individual case.

The decisions reported in the first eight years of practice under the new English legislation, however, call into question its effectiveness and raise the issue, as Max Rheinstein did in 1974 about discretionary distribution on divorce, of whether the price of individualized justice is simply too high. 305

The family-oriented protective devices available in most American jurisdictions, by contrast, preserve certain fixed property rights for the surviving spouse only. This system thus makes no attempt to account for recent trends in family behavior, and has been criticized for a number of other failings. Some propo-

301. See, e.g., In re Fullard, decd., 1982 Fam. 42, 46 (recommending that the costs of an unsuccessful applicant not be awarded out of the estate, in order to preserve the taker's share).

302. See generally Goodhart, supra note 299; Leubsdorf, Toward a History of the American Rule on Attorney Fee Recovery, 47 LAW & CONTEMPORARY PROBLEMS 9 (1984); see also the other articles collected in the excellent symposium on Attorney Fee Shifting, 47 LAW & CONTEMPORARY PROBLEMS (1984).

303. See supra text accompanying notes 251-66.

304. See supra text accompanying notes 287-94.

305. Rheinstein, Division of Marital Property, 12 WILLAMETTE L.J. 413, 432 (1976).
nants of reform have suggested English-style judicial discretion as a possible remedy for some of the defects they perceive in the American system.

While the English Act would seem well-equipped to remedy these defects, its questionable success at home should give pause to American legislators considering the adoption of judicial discretion in estate distribution. Furthermore, the English system may not be suited to American probate practice for several other reasons, including the experience with equitable distribution, the different judicial traditions of England and America, and the differences in allocation of legal costs.

Richard R. Schaul-Yoder

APPENDIX

Inheritance (Provision for Family and Dependents) Act 1975

1975 Chapter 63

An Act to make fresh provision for empowering the court to make orders for the making out of the estate of a deceased person of provision for the spouse, former spouse, child, child of the family or dependant of that person; and for matters connected therewith. [12th November 1975]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: —

1. — (1) Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons: —
   (a) the wife or husband of the deceased;
   (b) a former wife or former husband of the deceased who has not remarried;
   (c) a child of the deceased;
   (d) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
   (e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased; that person may apply to the court for an order under section 2 of this Act on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant.

(2) In this Act "reasonable financial provision" —
   (a) in the case of an application made by virtue of subsection (1)(a) above by the husband or wife of the deceased (except where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing), means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance;
   (b) in the case of any other application made by virtue of subsection (1) above, means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

(3) For the purposes of subsection (1)(e) above, a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person.
2. — (1) Subject to the provisions of this Act, where an application is made for an order under this section, the court may, if it is satisfied that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant, make any one or more of the following orders: —

(a) an order for the making to the applicant out of the net estate of the deceased of such periodical payments and for such term as may be specified in the order;
(b) an order for the payment to the applicant out of that estate of a lump sum of such amount as may be so specified;
(c) an order for the transfer to the applicant of such property comprised in that estate as may be so specified;
(d) an order for the settlement for the benefit of the applicant of such property comprised in that estate as may be so specified;
(e) an order for the acquisition out of property comprised in that estate of such property as may be so specified and for the transfer of the property so acquired to the applicant or for the settlement thereof for his benefit;
(f) an order varying any anti-nuptial or post-nuptial settlement (including such a settlement made by will) made on the parties to a marriage to which the deceased was one of the parties, the variation being for the benefit of the surviving party to that marriage, or any child of that marriage, or any person who was treated by the deceased as a child of the family in relation to that marriage.

(2) An order under subsection (1)(a) above providing for the making out of the net estate of the deceased of periodical payments may provide for —

(a) payments of such amount as may be specified in the order,
(b) payments equal to the whole of the income of the net estate or of such portion thereof as may be so specified,
(c) payments equal to the whole of the income of such part of the net estate as the court may direct to be set aside or appropriated for the making out of the income thereof of payments under this section, or may provide for the amount of the payments or any of them to be determined in any other way the court thinks fit.

(3) Where an order under subsection (1)(a) above provides for the making of payments of an amount specified in the order, the order may direct that such part of the net estate as may be so specified shall be set aside or appropriated for the making out of the income thereof of those payments; but no larger part of the net estate shall be so set aside or appropriated than is sufficient, at the date of the order, to produce by the income thereof the amount required for the making of those payments.

(4) An order under this section may contain such consequential and supplemental provisions as the court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between one beneficiary of the estate of the deceased and another and may, in particular, but without prejudice to the generality of this subsection —

(a) order any person who holds any property which forms part of the net estate of the deceased to make such payment or transfer such property as may be specified in the order;
(b) vary the disposition of the deceased's estate effected by the will or the law relating to intestacy, or by both the will and the law relating to intestacy, in such manner as the court thinks fair and reasonable having regard to the provisions of the order and all the circumstances of the case;
(c) confer on the trustees of any property which is the subject of an order under this section such powers as appear to the court to be necessary or expedient.

3. — (1) Where an application is made for an order under section 2 of this Act, the court shall, in determining whether the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters, that is to say —

(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
(b) the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future;
(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
(d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;
(e) the size and nature of the net estate of the deceased;
(f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;
(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

(2) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(a) or 1(1)(b) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to —

(a) the age of the applicant and the duration of the marriage;
(b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family; and, in the case of an application by the wife or husband of the deceased, the court shall also, unless at the date of death a decree of judicial separation was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce.

(3) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(c) or 1(1)(d) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the manner in which the applicant was being or in which he might expect to be educated or trained, and where the application is made by virtue of section 1(1)(d) the court shall also have regard —

(a) to whether the deceased had assumed any responsibility for the applicant’s maintenance and, if so, to the extent to which and the basis upon which the deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility;
(b) to whether in assuming and discharging that responsibility the deceased did so knowing that the applicant was not his own child;
(c) to the liability of any other person to maintain the applicant.

(4) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(e) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant and to the length of time for which the deceased discharged that responsibility.

(5) In considering the matters to which the court is required to have regard under this section, the court shall take into account the facts as known to the court at the date of the hearing.

(6) In considering the financial resources of any person for the purposes of this section the court shall take into account his earning capacity and in considering the financial needs of any person for the purposes of this section the court shall take into account his financial obligations and responsibilities.