# Testamentary responsibility

# Testamentary Responsibility

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## A. Introduction

Testamentary freedom – the freedom to determine the distribution of our assets after we die – is often described as the bedrock,[1] or organising principle of modern succession law which the rest of the law of succession is built upon or derived from. For instance, *The Restatement (Third) of Property* states that: 'The organizing principle of the American law of donative transfers is freedom of disposition.'[2] In England and Wales too, testamentary freedom is regarded as the default position.[3] Equally, civil law jurisdictions consider testamentary freedom to be core to succession law or indeed its natural starting point,[4] and in some of them it even enjoys constitutional protection.[5] Thus, Reinhard Zimmermann, defines testamentary freedom as 'one of the fundamental principles in the succession regimes of all legal systems in Europe as well as of those legal systems outside of Europe influenced by European law.'[6] Others have even described it as the trendsetting principle for a uniform European law of succession.[7]

Unsurprisingly, therefore, many people perceive testamentary freedom as something they have always had and should continue to have.[8] Hence, testamentary freedom is frequently treated by legal scholars as self-evident,[9] thus not requiring proof or explanation, and

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[1] M Glover, "Social Welfare Theory of Inheritance Regulation" (2018) UtahLR 411, at 414; LM Friedman, "The Law of the Living, The Law of the Dead: Property, Succession and Society" (1966) WisLR 340, at 355 describes it as a 'powerful principle of the law.' J Beckert, *Inherited Wealth* (2008) 21 sees it as the 'most important individual right in the transfer of property *mortis causa*.'

[2] *Restatement (Third) of Property: Wills and Other Donative Transfers* para 10.1 cmts. A, c (2003). DB Kelly, "Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications" (2013) 82 FordhamLR 1125, at 1138; and J Dukeminier and RH Sitkoff, *Wills, Trusts and Estates* (2013) 1.

[3] *Ilott v Mitson* [2017] UKSC 17, [2018] AC 545, [52], per Lady Hale.

[4] See R Zimmermann, "So jemand die Seinen, sonderlich seine Hausgenossen, nicht versorget, …. Zum Schutz der Angehörigen bei Enterbung" (2022) AcP 222 3, at 16; A Vaquer Aloy, *Libertad de Testar Y libertad Para Testar* (2018) 13; P Landau, "Die Testierfreiheit in der Geschichte des Deutschen Rechts im späten Mittelalter und in der frühen Neuzeit" (1997) 114 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (GA) 56, at 72.

[5] See Articles 14 I and Article 2(1) Grundgesetz.

[6] R Zimmermann (ed), *Freedom of Testation/Testierfreiheit* (2012) VII.

[7] I Kroppenberg, "Testierfreiheit", in J Basedow, KJ Hopt and R Zimmermann (eds), *Handwörterbuch des Europäischen Privatrechts,* vol II (2009), 1481, at 1484.

[8] K Rowlingson and S McKay, *Attitudes to Inheritance in Britain* (2005) 31 show that most people would like to be able to leave a bequest. And, according to A Bauer, *Die innere Rechtfertigung des Pflichtteilsrechts. Eine rechtsgeschichtliche, rechtsvergleichende und soziologische Untersuchung* (2008) 163, reveal show that people have a universal wish to be free to decide.

[9] By contrast, economists as well as political and moral philosophers have called private succession, including testamentary freedom, into question. See the debate outlined by PB Miller, "Freedom of Testamentary Disposition" in S Degeling, J Hudson and I Samet (eds), *Philosophical Foundations of the Law of Express Trusts*

certainly not really questioned in recent succession law reform debates. This is so even though inheritance and the freedom to decide how to distribute it is often seen as a primary contributor to increased wealth inequality.[10]

This focus on testamentary freedom, and consequently on donor intent, has significant implications. It has affected how we perceive doctrines that restrict, or are seen to restrict such freedom, how we have come to explain decisions about the distribution of wealth through default rules including in case of intestacy, as well as how we have come to see the role and function of succession law.

The aim of this article is to challenge these perceptions and related assumptions and to question testamentary freedom as the self-evident organising principle of modern succession law. Its purpose is to bring into sharper focus another important value of succession law: 'responsibility'. While we speak of responsibility in other areas of private law (as in delict and tort),[11] and we tend to assume that responsibility is a function of public rather than private law,[12] this article argues that it is important to acknowledge and appreciate responsibility as an underpinning value of succession law including of testate succession. Hence my title: "testamentary responsibility".

By saying that a testator has testamentary responsibility I am not suggesting that testamentary freedom is morally suspect or that it should be abolished. Neither am I saying that a person's assets should automatically go to her family or the state or crown. Rather, my aim is to re-orient the debate towards 'responsibility' as the starting point for theorising succession law and to show that responsibility is compatible with, and indeed intrinsic to, the exercise of testamentary freedom. In other words, the dichotomy between responsibility and freedom is, in my view, a false one.

This article has three main parts. The first Part B, sets the scene and examines possible reasons why we have come to think of testamentary freedom as the organising principle of testamentary freedom and what consequences ensue when we place testamentary freedom, and thus testator intent, centre stage. It further explores what I mean by 'testamentary responsibility' for the purposes of this article. Part C then aims to deconstruct the prevailing narrative of the concept of testamentary freedom by showing not only its contingency, and that there is nothing inevitable or self-evident about it, but also that testamentary freedom and responsibility have not been mutually exclusive concepts. To do so, the article explores what insights we might be able to glean by taking a historical, comparative, and contextual perspective, with a particular focus on Roman and English law. Both Roman and English law illustrate long-standing and deeply engrained notions of testamentary responsibility at work.

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(2023) 176, at 177, as well as contributions in H-C Schmidt am Busch, D Halliday and T Gutmann (eds), *Inheritance and the Right to Bequeath. Legal and Philosophical Perspectives* (2023).

[10] The literature is vast. See, especially, T Picketty and G Zucman, "Wealth and Inheritance in the Long Run" in AB Atkinson and F Bourguignon (eds), *Handbook of Income Distribution*, Volume 2, (2015) 1303; AB Atkinson, *Inequality. What can be done?* (2025) 158-160; J Beckert, *Inherited Wealth* (n 1); J Beckert*, Erben in der Leistungsgesellschaft* (2013); R Chester, *Inheritance, Wealth, and Society* (1982); D Halliday, *The Inheritance of Wealth. Justice, Equality, and the Right to Bequeath* (2018) 122-154; DW Haslett, "Is Inheritance Justified?" (1986) 15 Philosophy & Public Affairs 122-155; SS Braun, "Historical Entitlement and the Practice of Bequest: Is There a Moral Right of Bequest?" (2010) 29 Law and Philosophy 695-716; AA Tait, "Inheriting Privilege" (2021) 106 MinnLR 1959; J Scott, *The Upper Classes: Property and Privilege in Britain* (1982) 119.

[11] See, for instance, T Honoré, "Responsibility and Luck" (1988) 104 LQR 530 and N Jansen, "The Idea of Legal Responsibility" (2014) 34 OJLS 221.

[12] A Röthel, "Ist es gerecht, dass es ein Recht zu vererben gibt? Zum produktiven Potential fundamentaler Erbrechtskritik für die Rechtswissenschaft" (2020) 220 AcP 19 at 38.

Finally, Part D aims to show that shifting our attention to testamentary responsibility, and acknowledging it as the point of departure, opens up new and different ways of theorising and understanding the aims of succession law, its place on the map of private law, but also its underpinning rationale.

## B. Setting the scene

### (1) Why have we placed testamentary freedom centre stage and what consequences ensue?

How have we come to think of testamentary freedom as the bedrock principle of modern succession law and one that seems to be untouchable? The answer is complex and cannot be fully explored here. However, one principal explanation is that our understanding of testamentary freedom is deeply rooted in the development of our understanding of property rights. Testamentary freedom is, in fact, often perceived as a continuation of the freedom to dispose of our property during our lifetime. John Stuart Mill famously said that 'the ownership of a thing cannot be looked upon as complete without the power of bestowing it, at death or during life, at the owners' pleasure'. [13] We assume that because we own property, our wishes regarding the disposition of our property should automatically be respected even after we have passed away. Hence, in legal scholarship freedom of testation is described as either part of the 'bundle of rights' that define ownership,[14] or as a principle that is required to secure and support the continuity of private ownership.[15]

This understanding of testamentary freedom as being rooted in property law has, I believe, also affected our views of what a person leaves behind when she dies, namely assets rather than relationships, which is a point I will return to later. It further seems that it has directed the focus of succession lawyers primarily onto the transfer or distribution of assets on death. But, of course, succession—and thus succession law—is about so much more. Decisions about what happens to our assets after we die are intimately linked to our fears of mortality, concerns about how we will be remembered, and whether and how our name, projects and values will continue, but also, and importantly, concerns and care for those whom we leave behind, and thus our relationships with others and the community we live in.

It would be interesting to explore how we have come to look at succession law primarily through the lens of property, rather than family law or the law of persons more generally, but this goes beyond the scope of this article. What matters for this inquiry is that putting testamentary freedom centre stage, and consequently focusing on testator intent, has had important implications. I will highlight here three main implications that I see as problematic.

First, by treating testamentary freedom as a given and thus using it as the starting point for theorising succession law, we have come to regard certain rules and doctrines as

[13] JS Mill, *The Principles of Political Economy* (Book II, chapter 2, iv) (2004). For a recent exploration of the topic see, especially, D Halliday, "Property rights and the power to transfer" in Schmidt am Busch, Halliday and Gutmann (eds), *Inheritance* (n 9) 95. See also Friedman (n 1) at 355 according to whom '[t]he power of disposition is felt psychologically to constitute an essential element of power over property.'

[14] AM Honoré, "Ownership" in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 107, 120-122; M Grimaldi, *Droit des successions*, 7th edn (2017) 10 describes it as the 'expression de la souveraineté du droit de propriété.'

[15] Röthel "Ist es gerecht" (n 12) at 27.

restrictions on this freedom and, consequently, to see them in a pejorative light, i.e. as something that detracts from freedom. We can see that, for instance, in the context of formality requirements for wills. Common lawyers have frequently criticised courts for their excessive formalism, on the basis that formalities applicable to wills can be intent-defeating.[16] Conversely, rules concerning the automatic revocation of wills in case of re-marriage or divorce of the testator have been welcomed on the basis that they better reflect the testator's presumed wishes. Equally, provisions that protect the interest of family members (such as mandatory family protection provisions) but also society (such as, for instance, perpetuity rules), tend to meet with critical eyes and the burden of justification is therefore usually placed on those who argue in favour of such inroads.

It is, then, perhaps unsurprising that in scholarly literature, testamentary freedom is often placed in opposition to solidarity including family solidarity.[17] We see that, for instance, in the debate concerning inheritance tax,[18] but especially in the debate surrounding the desirability of family protection through succession law in the form of forced or compulsory heirship (typical of civil law jurisdictions) or family provision legislation (typical of common law jurisdictions).[19] Thus, several authors speak of the need to balance party autonomy against the need to protect the interest of the family.[20] However, the opposition between testamentary freedom and solidarity is, as I will argue, ill-conceived.

Second, this emphasis on testamentary freedom and, simultaneously, testator intent, has also had the effect that succession lawyers, as well as legislatures and law reformers, have tried to explain other areas and certain doctrines of succession law as reflecting such testator intent. For instance, intestate succession provisions, namely provisions that apply in the absence of a valid will that covers the entire estate, are often explained on the basis of the deceased's presumed intent.[21] This is the case even when it is unlikely that the distribution of assets as established by intestacy rules reflects what the testator would have wanted.

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[16] J Langbein, "Substantial Compliance with the Wills Act" (1975) 88 Yale LJ 489. Equally, D Horton, "Revoking Wills" (2021) 97 Notre Dame LR 563 has criticised the formalities required for the revocation of wills as intent defeating. The doctrine of negative wills has also been described as intent defeating. See S Kreiczer-Levy, "Property's Immortality" (2016) 23 Cardozo JL & Gender 107, at 119.

[17] N Papantoniou, "Die soziale Funktion des Erbrechts" (1973) 173 AcP 385, at 393; LM Simes *Public Policy and the Dead Hand* (1955) at 1 titled the first of his five Cooley Lectures 'Should the Dead Hand Distribute: Free Wills vs Family'. See also S Kreiczer-Levy, "Property's Immortality" (2016) 23 Cardozo JL & Gender 107, at 111; B Sloan, *Borkowski's Law of Succession*, 4th edn (2020) at 2. Critical of this, however, R Meyer-Pritzl, "Aufgabe und Notwendigkeit der Präzisierung der Testierfreiheit angesichts der Herausforderungen durch das Sozialrecht und den Antidiskriminierungsschutz", in M Martinek, P Rawert, B Weitemeyer (eds), *Festschrift für Dieter Reuter zum 70. Geburtstag am 16. Oktober 2010* (2010) 205, at 207 ff.

[18] Halliday, *The Inheritance* (n 10); Jørgen Pedersen & Steinar Bøyum, "Inheritance and the Family" (2020) 37 Journal of Applied Philosophy 299.

[19] The introduction of the family provision legislation in England triggers a significant debate. See the contributions by J Gold, JL Robson, O Kahn-Freund and W Breslauer on "Freedom of Testation. The Inheritance (Family Provision) Bill" published in (1938) 1 MLR 296-307. For a discussion of the critical voices, see R Hedlund, "The end of testamentary freedom" (2020) Legal Studies 1, 15 ff.

[20] Zimmermann, "Freedom of Testation" (n 6) VII; A Bonomi, "Testamentary Freedom or Forced Heirship? Balancing Party Autonomy and the Protection of Family Members" in M Anderson and E Arroyo i Amayuelas (eds), *The Law of Succession: Testamentary Freedom. European Perspectives* (2011) 27 at 27. J Goebel, *Testierfreiheit als Persönlichkeitsrecht. Zugleich ein Beitrag zur Dogmatik des Allgemeinen Persönlichkeitsrechts* (2004) 50; A Zoppini, *Le successioni in diritto comparato* (2002) 5.

[21] KGC Reid, MJ de Waal and R Zimmermann, "Intestate Succession in Historical and Comparative Perspective" in KGC Reid, MJ de Waal and R Zimmermann (eds), *Comparative Succession Law: vol II*: *Intestate Succession* (2015) 442, at 446.

Consider, for example, those cases where the deceased's assets go to the state or to remote relatives (frequently referred as the so-called 'laughing heirs') whose existence was unknown to the deceased, rather than to the deceased's cohabitant or stepchildren. And sometimes the distribution follows intestacy rules even when there is clear evidence that this conflicts with the testator's actual intention, as for example where there is a will, but it fails, for instance, for lack of the required formalities, or the will is reduced, for example, because it infringes forced or compulsory heirship provisions. The fact that intestacy rules do not reflect the actual intentions of the deceased is unsurprising. After all, intestacy rules are usually fixed and rigid, and by definition cannot reflect the actual intention of the individual deceased, nor necessarily that of the average deceased person, because their wishes are simply difficult to establish and are bound to change over time.[22] Yet, we seek to explain intestacy rules primarily on the basis of the deceased's presumed intent.

Equally, certain default rules of the law of wills have been explained through the deceased's presumed intention. For instance, the rules on the automatic or implied revocation of a will in case of the testator's marriage or divorce are frequently justified by reference to the deceased's presumed wishes. The same is true regarding the revocation of a will in case of subsequent birth of a child not mentioned in the will. The argument goes that the deceased would have wished to benefit the child who was born after the will was made. However, this is another instance where the presumption of the wishes of the deceased can potentially operate in spite of the deceased's express wishes, as where the will is revoked and the estate falls into intestacy.[23] It seems, then, that the concept of the 'presumed intention' frequently conceals the true motivations behind the legislature's distributive choices. This is problematic because by resorting to presumed intention we risk overlooking other important values of succession law. As I will try to show later, there are other more fitting ways to explain these choices.

Third, because testamentary freedom and testator intent have gained such a prime place within succession law, the purpose of succession law (and consequently also the purpose of adjacent areas such as trust law) is sometimes reduced to the implementation and fulfilment of testator intent regarding the distribution of their wealth. For instance, the Alberta Law Reform Institute has stated that, '[t]he traditional view is that the aim of succession law is to give effect to the wishes of the testator.'[24] But succession law fulfils many different purposes,[25] and it protects many other interests, including those of the deceased's family, of creditors, but also society at large. And these interests need not necessarily be in conflict with those of the deceased. Also, succession law protects many different values, and not just autonomy, but also, for instance, equality, continuity,[26] and stability. All in all, therefore, the

[22] Critical of the empirical value of the presumed intention is G Christandl, "The Nature and Function of Default Rules in Succession Law: A Comparative Analysis" in B Häcker and J Ungerer (eds), *Default Rules in Private Law* (*forthcoming*) at section II.A.

[23] For a fascinating analysis of the Scots law in a comparative perspective see RRM Paisley, "The Rationale and Fundamental Structure of the *Conditio Si Testator Sine Liberis Decesserit* in Scots Law" in ARC Simpson, SC Styles, E West and ALM Wilson (eds), *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte* (2016) 280 who shows at 338 that 'the policy has comprised to some extent a desire to emulate the presumed intentions of what could be regarded as a morally responsible testator.'

[24] Alberta Law Reform Institute, *Succession and Posthumously Conceived Children*, Report for Discussion No 23, January 2012, page 47. Microsoft Word - RFD 23_web.docx (ualberta.ca).

[25] For an in-depth analysis of the various functions of succession law, see A Dutta, *Warum Erbrecht?* (2014).

[26] On continuity, see especially S Kreiczer-Levy, "Inheritance Legal Systems and the Intergenerational Bond" (2012) 46 Real Property Trusts & Estate LJ 495; Kreiczer-Levy, "Property's Immortality" (n 17).

emphasis on testamentary freedom has narrowed our view of succession law and its aims and underpinning values. The aim of this article is to broaden this view by challenging testamentary freedom as the starting point. Before I do so it is important to clarify what I mean by 'responsibility' and, in particular, 'testamentary responsibility'.

## (2) The meaning of responsibility

The term 'responsibility' has more than one meaning, including in the legal context. In tort law it is often described as a fundamental, albeit abstract, concept that indicates that a person is responsible for harm they have caused.[27] In this article, I use the term 'responsibility' in a broad sense. In particular, when speaking, of 'testamentary responsibility', I do not use it in the sense that the deceased is at fault or to blame for something they have done. Neither do I mean to argue that testators have a duty to provide reasons for the decisions they make in the context of their wills.[28] In other words, it is neither necessary nor sufficient that testators explain in their will why they have omitted certain successors, why they have prioritised some interests over others, or why they have not made a disposition to support a particular cause.

What I mean instead is that testators should dispose of their wealth in a responsible manner, that is in a manner that is responsive to and reflective of their relationships with others, whether past,[29] present, or future.[30] In other words, they should behave in the way that is in line with their legal and moral obligations towards others.

The source or basis of the testator's responsibility is thus the relationships with other persons. This article takes, in fact, the view that more than assets, testators leave behind relationships or a network of relationships such as, for instance, relationships with those who are dependent on them, those who have provided services or have cared for them, those who have relied on their promises, relationships with creditors, as well as the community they live in. These relationships do not die with the testator's death and his or her will should reflect that.

Testamentary responsibility is both backward-looking and prospective. It is backward-looking in the sense that testators are answerable for debts they have incurred, promises they have made and benefits they have gained at the expense of others. Testamentary responsibility is prospective in the sense that it requires testators to provide, for instance, for family members who are or may be in need. Prospective responsibility may also entail that testators abstain from attempting to control the future destination of their assets or the lives of future generations in an unreasonable manner, or avoid wasting wealth through long-term projects.

The idea that testators should act responsibly is not a new concept. As I will show in the next part, testamentary freedom has not always been regarded as the bedrock or organising principle of succession law or the norm, nor has it been self-evident. In fact, it has fluctuated throughout history and at times has come under considerable attack. More importantly, it has been imbued with notions of responsibility, and not just responsibility towards the

[27] P Cane, *Responsibility in Law and Morality* (2002) Chapter 1. See also Jansen (n 11) and Honoré (n 11).

[28] This approach is taken by S Kreiczer-Levy, "Deliberate Accountability Rules in Inheritance Law: Promoting Accountable Estate Planning" (2012) 45 University of Michigan Journal of Law Reform 937.

[29] Concerning obligations towards our predecessors see J Thompson, "Inherited Obligations and Generational Continuity" (1999) 29 Canadian Journal of Philosophy 493.

[30] Regarding responsibilities towards future generations, see GS Alexander, *Property and Human Flourishing* (2018) at 103.

deceased's family. To see that we need to take a look at developments across time and space, and in context.

## C. Testamentary freedom: a historical, comparative, and contextual approach

Reconstructing testamentary freedom from a historical and comparative perspective is a complex endeavour that one article alone cannot do justice to. However, what I aim to do here is to point out what a historical, comparative, and contextual enquiry can enable us to see with a focus on Roman and English law. In doing so, I aim to make three main points: first, I aim to show that the point of departure of succession law was not one of a situation of freedom but rather one of a rigid system of family succession into which, at various points in history, elements of freedom in the form of a power to make a will have been introduced as a corrector so as to allow certain persons to make decisions over certain aspects of their estate. Second, this power to make decisions about the distribution of the deceased's assets was never meant to be exercised arbitrarily but rather in a responsible manner. This is true of both Roman and English law. Third, even when the concept of testamentary freedom has appeared in legal language, it was never unquestioned or uncontested. Rather, it is a contingent concept. But let us look at each of these claims in more detail.

### (1) A testamentary power granted to correct a rigid system of succession

If we look at the origins of testamentary freedom in both the civil and common law traditions, we discover that the capacity or power to make a will, and thus to dispose of assets with effect on death, has emerged primarily as a corrector of a rigid system. In other words, testamentary freedom was neither the premise nor the norm, but was instead meant to instil some flexibility into a system of inevitable family succession.

For instance, in early Roman law, family property went to the *paterfamilias*' children and the wife, leading to some kind of *consortium* among them. This brought the risk that the property might not be sufficient to support the entire family. The heirs could therefore dissolve the *consortium*.[31] However, such a dissolution entailed the danger of a fragmentation of wealth and especially the splitting of farms, which was highly undesirable. And as Champlin has pointed out it also risked that the *paterfamilias* would pass from memory.[32] It is in this context that, in second half of the fourth century BCE, the possibility developed for the *paterfamilias* to choose an heir who could continue the farm. To choose an heir was also necessary on religious grounds, for the heir was responsible for family worship.[33] But as we will see later, the fact that the *paterfamilias* was granted the power to choose an heir did not mean that he could act in an arbitrary manner or that he would necessarily neglect other

[31] M Kaser, *Das Römische Privatrecht*, vol I, 2nd revised edn (1971) 108 ff; R Zimmermann, "Compulsory Heirship in Roman Law", in KGC Reid, MJ de Waal and R Zimmermann (eds), *Exploring the Law of Succession. Studies National, Historical and Comparative* (2007) 27, at 29.

[32] E Champlin, *Final Judgments: Duty and Emotion in Roman Wills 200 B.C.- A.D. 250* (1991) at 16.

[33] As for the relationship between inheritance and the obligation to worship the dead, see CW King, *The Ancient Roman Afterlife.* Di Manes*, Belief, and the Cult of the Dead* (2020) 33 ff.

children or relatives who would normally be looked after through *inter vivos* acts. Also, we will see below that the *paterfamilias* had to comply with rigid formality requirements.[34]

In England too, freedom was introduced as a corrector to the lack of flexibility of the existing rules.[35] Unlike in Roman law, until 1925 succession to land and moveable property followed different rules, which is still the case in Scotland. Just as in Scotland, in England, the use of wills was restricted to moveable property.[36] Yet, if the deceased left a wife and children, only one third of the moveable property (after payment of debts) the so-called 'dead's part', could be disposed of freely. Thus, the power to make a will was limited to a small part of the entire estate. While it is unclear why in England this restriction has disappeared, we know that in most of the country it remained in place until the fourteenth century, and in some regions even longer, as for example in the county of Yorkshire where the scheme was only abolished in 1692, in Wales in 1696, and in London in 1724.

Succession to land was instead determined by primogeniture whereby the firstborn son inherited the land. Only if there were no sons did daughters inherit, and then jointly. It is against this backdrop of inevitable succession to land that in English legal practice uses – the forerunners of modern trusts – developed as a device not just to avoid feudal incidents but to enable landowners to make dispositions of land with effect on death. In other words, uses were employed to determine the disposition of land after the landowner's death. This inheritance practice then led to the introduction of restrictions on such uses in 1535 through the Statute of Uses so as to restore the revenue that the Crown had lost. Unsurprisingly, the Statute met with considerable opposition from landowners. This opposition, but especially the concern that lawyers were already developing devices to circumvent the newly introduced restriction,[37] eventually resulted in the granting, in 1540, of a general power of disposition of most land through the Statute of Wills.[38] The argument behind calls for greater freedom was that landowners 'could pay their debts and provide for their children's marriages'.[39] Thus, arguably, the justification for an increase in the power to dispose of their wealth was that it would allow landowners to behave responsibly.

While for the first time, land could now be disposed of with effect on death,[40] this general power of disposition came with some limitations.[41] These were first the dower which provided the widow with a life interest in one-third of the real estate of her deceased husband

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[34] See below at 000.

[35] J Bentham, *The Theory of Legislation,* 4th edn (1882) 183 it is for the proprietors 'who can and ought to know the particular circumstances in which those who depend upon him will be placed at his death, to correct the imperfections of the law in all those cases which it cannot foresee'.

[36] MM Sheehan, *The Will in Medieval England. From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century* (1963) 282; RH Helmholz, *Oxford History of Laws of England*, volume I, 388.

[37] J Baker, *Oxford History of the Laws of England*, vol. VI, 1483-1558 (2003) 653, 680.

[38] The Statute of Wills of 1540, as amended in 1542, enabled all land held by socage tenure and up to two-thirds of that held by knight service to be freely devised. With the abolition of military tenures in 1660, all freeholders had freedom of disposition. However, some local customs seemed to have recognised the power of disposition of land also earlier. See Baker, *Oxford History* (n 37) at 681 fn 198; Sheehan, *The Will* (n 36) 274; FW Maitland, *Township and Borough* (1898) 71.

[39] Baker, *Oxford History* (n 37) at 679.

[40] In Scotland, until 1868, testaments could not be used for heritable property. Instead, testators had to resort to various forms of lifetime conveyances. For details, see KGC Reid, "Testamentary Formalities in Scotland" in KGC Reid, MJ de Waal and R Zimmermann (eds), *Comparative Succession Law: vol I: Testamentary Formalities* (2011) 405, at 410.

[41] R Kerridge, "Freedom of Testation in England and Wales" in M Anderson and E Arroyo I Amayuelas (eds), *The Law of Succession: Testamentary Freedom. European Perspectives* (2011) 129, at 133 ff.

but also curtsey whereby the husband was entitled to a life interest in the whole of the wife's real estate.[42] Second were the perpetuity rules that restricted the extent to which a testator could control the fate of his property for generations to come.[43] Third were the mortmain restrictions which limited dispositions for the benefit of the Church or corporations.[44] Some of these restrictions were only eliminated in the course of the 19th and 20th centuries though, as we will see below,[45] at that point other measures were introduced to keep testamentary freedom within bounds. In other words, restriction of one kind were relaxed but followed by restrictions of another and the freedom was perhaps more apparent than real.

Thus, while the introduction of an element of flexibility was required for different reasons in Roman and English law, in both cases testamentary freedom did not represent the point of departure,[46] nor did it represent the norm. The power to make a will was introduced for specific and limited functions.[47] What is more, in both Roman and English law, the capacity to make a will was granted only to certain groups of people. In Roman law, only Roman citizens could make a will and within the citizen body several groups were simply excluded from will making. This included, for instance, those who were *alieni iuris* (ie children in the power of their father), and those *sui iuris* but under age, insane, interdicted prodigals, the deaf and dumb, some condemned and all women who had not undergone *capitis deminutio*.[48] Also, at the time, capacity lost after the will had been written could affect the validity of the will.[49] As for England, Henry Swinburne's treatise of 1591 dedicates a long section to the exploration of those who lacked capacity to make a will, including those who lacked discretion (for example, children, mad folks, idiots and the like), those who lacked freedom (bondslaves and villains, captives and prisoners and women covert), those who lacked some of their principal senses (such as dumb and deaf, and blind persons), those who had committed some heinous crime (such as traitors, felons, heretics), and those who suffered from certain legal impediments (such as prodigal persons, an ecclesiastical person or a person at the point of death).[50] Thus, all in all, few people actually possessed the capacity to make a will in the first place, and even then not, as we have seen, over their entire estate.

### (2) A testamentary power to be exercised in a responsible manner

[42] Both dower and curtsey were formally only abolished with the Administration of Estates Act 1925.

[43] The rule against perpetuities was introduced in 1681. Later on, the transfer of assets on trusts was limited also by other doctrines or principles, e.g. the beneficiary principle, the doctrine of *Saunders v Vautier*, and the requirement of three certainties.

[44] See the Mortmain Act 1736 which AH Oosterhoff, 'The Law of Mortmain: An Historical and Comparative Review' (1977) 27 The Univ of Toronto LJ 257, at 279 describes as a natural extension of earlier statutes that date back to the 13th century. Kerridge, "Freedom of Testation" (n 41) 137-8 mentions another restriction that operated in disguise that is the construction of wills. Regarding the construction of wills in the 19th century and the technique of the 'general intention', see especially Anderson, *Oxford History* (n 63) 26 ff.

[45] At 000.

[46] The same is true of Germanic law where intestate succession preceded testate succession. See R Zimmermann, "Heres fiduciaries? Rise and Fall of the Testamentary Executor" in R Helmholz and R Zimmermann (eds), *Itinera Fiduciae. Trust and Treuhand in Historical Perspective* (1998) 267 at 277-8. However, in Germanic law too, the introduction of the so-called 'free part' provided some flexibility. For a historical examination of the free part see EF Bruck, *Kirchenväter und soziales Erbrecht. Wanderungen religiöser Ideen durch die Rechte der östlichen und westlichen Welt* (1956).

[47] Kaser, *Privatrecht* (n 31) vol. II, 669.

[48] Champlin, *Final Judgments* (n 32) 42.

[49] E Jakab, "Inheritance" in PJ du Plessis, C Ando and K Tuori (eds), *The Oxford Handbook of Roman Law and Society* (2016) 498 at 502.

[50] H Swinburne, *A Brief Treatise of Testaments and Last Wills* (1591). Sheehan, *The Will* (n 36) 233-258.

The second point I would like to highlight is that the flexibility that this capacity or power to make a will granted (when indeed it was granted) was not one to act in an arbitrary manner. Rather it was intended and meant to be exercised 'responsibly'. We saw earlier[51] that in England, this argument was invoked to justify the extension of the power to make a will to land. The flexibility was required so that the deceased could honour certain obligations whether legal or moral ones: i.e. obligations towards family, friends, the Church, the community and thus society more generally. It was flexibility to do the right thing, not to act in an arbitrary fashion.

### (a) What did it mean to be responsible?

But what did it mean to be responsible at the time? In Roman law, a responsible *paterfamilias* was one who i) avoided the fragmentation and squandering of assets, including through lifetime gifts;[52] ii) provided for the children, grandchildren, wife and near relatives whether through a disposition with effect on death or lifetime acts; and, iii) rewarded friends who had provided services. In other words, the model testator was one who would be guided by his affection and moral sense.[53] And various studies suggest that Roman testators were on the whole motivated by the desire to comply with their obligations – whether moral or legal ones – and thus to act responsibly.[54] Thus, the will usually reflected the personal relationship that the deceased had during his lifetime.[55] Indeed, Champlin has argued that the primary motivation for making a will was the duty of testacy which included the duty to select a proper heir, the duty to repay obligations and to reward friendship.[56] This appears to have extended also to other instruments that were functionally similar to wills such as *fideicommissa*. According to Saller just like wills, *fideicommissa* too were used by *paterfamilias* 'not to avoid their basis obligations to their children or to pursue grand strategies, but to deal with individual circumstances in diverse ways to fulfil their duty to their offspring.'[57] In some cases that meant that it was actually necessary to disinherit children, as where the deceased's debts were too high and children risked being burdened by heirship,[58] or where it was important not to fragment the estate.[59]

As for England, I mentioned earlier that as far as moveable property was concerned, at first only the so-called 'dead's part' could be freely disposed of. However, the right thing to do was not to dispose of this dead's part in an arbitrary manner but to leave it to the Church *pro*

[51] See above at 000.

[52] The *Lex Cincia* prohibited gifts exceeding a certain value. For an analysis, see R Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1996) 482 ff.

[53] One underlying motive was to maintain a network of relationships with friends which would then benefit the successors of the *paterfamilias*. See C Paulus, *Die Idee der Postmortalen Persönlichkeit im römischen Testamentsrecht. Zur gesellschaftlichen und rechtlichen Bedeutung einzelner Testamentsklauseln* (1992) 70-77.

[54] Champlin, *Final Judgments* (n 32) 19; Paulus, *Die Idee* (n 53) 53 ff; Jakab (n 49) at 503.

[55] Paulus, *Die Idee* (n 53) 53 ff.

[56] Champlin, *Final Judgments* (n 32) 21.

[57] RP Saller, *Patriarchy, property and death in the Roman family* (1994) 177.

[58] C Humfress, "Gift-giving and inheritance strategies in late Roman law and legal practice" in O-A Rønning, H Møller Sigh and H Vogt, *Donations, Inheritance and Property in the Nordic and Western World from Late Antiquity Until Today* (2017) 8, at 8.

[59] B Nicholas, *An Introduction to Roman Law* (1962) 260.

*salute animae* that is for the salvation of the deceased's soul, though pious legacies to hospitals or orphanages were also not uncommon.[60] In fact, in medieval England, the will seems to have been first introduced primarily as an instrument to give alms and the expectation was very much that the testator would do precisely that.[61]

As far as land was concerned, once a general testamentary power to dispose of land was introduced in 1540, the right (or customary) thing to do was usually to settle the property on a strict settlement.[62] The strict settlement was a legal device that was used by landowners to preserve and keep their land within the family – a device that was largely for the benefit of the eldest son, though younger children were often provided for in other ways.[63] These settlements were very common between the 17th and 19th centuries to the point that wills were mainly employed by the English landed elite to dispose of property not covered by the settlement but acquired in trade or business.[64] By contrast, according to Stuart Anderson, middle-class men accumulated wealth to pass on to their children.[65]

Thus, being responsible could require different things at different times, usually including paying one's debts, not squandering but rather preserving family wealth whether during lifetime or on death, and looking after one's family, but also making contributions to the Church or charities and thus the community the deceased had been part of, which is a point I shall return to later.

### (b) What was the source of the duty to act responsibly?

Thus far, I have talked about what it meant to be responsible. But what were the sources of the duty of a testator to exercise the power of disposition in a responsible manner, and what consequences ensued if the testator did not act as such? The answer is again complex, for the pressure or incentive to behave responsibly came from different sources and was motivated by different concerns.

On the one hand, in both Roman and English law, the behaviour of the testator was clearly guided by societal expectations and social pressure, based, for instance, on local customs or the fact that the wealth came from ancestors.[66] Hence, irresponsible behaviour on the part

[60] Sheehan, *The Will* (n 36) 262.

[61] Ibid, at 303. F Pollock and FW Maitland, *The History of English Law*, vol 2 (2dn ed 1899) 314.

[62] Kerridge, "Freedom of Testation" (n 41) at 134. He argues in fact that 'during the eighteenth and nineteenth centuries, there was no true freedom of testation for most substantial landowners in England and Wales'.

[63] The literature is vast and partly conflicting. For a small sample, see J Habbakuk, *Marriage, Debt and the Estates System: English Landownership* (1994); L Stone and JCF Stone, *An Open Elite? England 1540-1880* (1984); and L Bonfield, "Affective Families, Open Elites and Strict Settlements in Early Modern England" (1986) Economic History Review 341, and E Spring, *Law, Land, & Family* (1993).

[64] S Anderson, *The Oxford History of the Laws of England*, vol. XII (2010) 12 shows that Chancery had jurisdiction to originate a settlement of its own choosing for the Chancery's own wards and '[t]he equity was to devise a settlement in analogy to what a prudent parent would probably have done in giving a portion to a daughter'. That said in the 19th century there was apparently a shift (45) and 'judges laid more responsibility on testators and their advisors, and accepted less themselves.'

[65] Anderson, *The Oxford History* (n 64) 10.

[66] PS Atiyah, *The Rise and Fall of Freedom of Contract* (1985) 89, referring to the 18th century, argued that '[t]o receive property from an ancestor, or even from a living person, placed a man under social and moral obligations to his family and posterity.' For a long time, legal systems differentiated between wealth that the deceased had himself earned and wealth that had been passed down from previous generations. For instance, Scots law

of the testator met with social consequences, such that it could lead to social disapproval and reputational damage.[67] The fact that wealthy citizens made their wills already at a young age,[68] and that at least during the Republic most Roman wills were characterised by a certain level of publicity,[69] whether because they were made in the assembly of the Roman people or in the presence of witnesses, augmented the social pressure to behave in a responsible manner. It also meant that wills attracted a significant level of public interest. But even in England, where until the Statute of Frauds of 1677 wills of moveable property required no formalities 'writing the will was […] a responsibility that defined respectability'.[70] The will was a way to safeguard the testator's reputation beyond the grave. And as Green put it, 'testamentary freedom was exercised in the context of customary expectations by the living as well as the dead.'[71]

Societal pressure aside, there also came pressure from within the family. For a start, testamentary behaviour was (and is) often determined by concerns to avoid conflict among family members. Also, there was the danger that if the testator behaved irresponsibly, the heir would not accept the inheritance. For instance, if the Roman *paterfamilias* imposed too many legacies that would burden the heir, there was a risk that the latter would not accept the inheritance.[72] As we will see below, to mitigate the risk, the *lex Falcidia* (41–40 BCE) established that the heirs who took under the will could receive no less than a quarter of the estate. Another possibility was that the heir would simply not comply with the deceased's wishes.

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distinguished between heritage and conquest, and England too distinguished between land acquired by purchase and land acquired by inheritance. The same is true for the European continent. Regarding the differentiation between *Erbgut* and *Errungenschaften* in Germanic law, see G Wesener, 'Beschränkungen der Testierfreiheit in deutschen Stadtrechtsreformationen und Landrechten der Rezeptionszeit' in WG Becker and L Schnorr von Carolsfeld (eds), *Sein und Werden im Recht. Festgabe für Ulrich von Lübtow zum 70. Geburtstag am 21. August 1970* (1970) 569 ff. For France, see Rüfner (n 93) at 43 ff.

[67] See Champlin, *Final Judgments* (n 32) at 11 as well as 15: 'Society and the law took a dim view of the upsetting of natural affection and of the transfer of property away from those who had a natural claim on it.' At p 20, Champlin recites the story of the knight Q.Caelilius who did not keep his word, and instead of making Lucullus his heir left his property to his nephew Atticus. Apparently, as a punishment, the people of Rome dragged the knight's corpse through the street with a rope around his neck.

[68] Jakab (n 49) at 499.

[69] Paulus, *Die Idee* (n 53) 46, 72 and 84. This publicity did not, however, last forever. See P Du Plessis, *Borkowski's Textbook on Roman Law*, 6th edn (2020) 222.

[70] DR Green, "To do the right thing. Gender, wealth, inheritance and the London middle class" in A Lawrence, J Maltby, and J Rutterford (eds), *Women and their money 1700-1950: Essays on women and finance (*2008) 133 at 133. See also A Owens, "Property, gender and the life course: inheritance and family welfare provision in early nineteenth-century England" (2001) 26 Social History 303, at 304 who has argued in the context of wills made in nineteenth-century Stockport that 'Most legacies bequeathed to family members were not conceived of as 'gifts' – a token or gesture of regard, or a signal of approbation – rather, they were made with a strong sense of responsibility and duty.' And, '[t]he emphasis was thus on providing rather than disposing and, to some extent, on managing and preserving, rather than fragmenting and dispersing an estate. In making a provision, the needs of individual family members, within the context of the life course, the dynamic relational space of the family, and amidst public expectations of provision, had to be carefully considered.' See further RJ Morris, *Men, Women and property in England, 1780-1870: A Social and Economic History of Family Strategies among the Leeds Middle Classes* (2005) 97 who argues that wills were directed by a sense of 'moral obligation, legitimacy and custom' but also (at 137) a strong sense of responsibility towards widows and equity towards children.

[71] Green (n 70) at 135. See also OK McMurray, "Liberty of Testation and Some Modern Limitations Thereon" in (1919-1920) 14 Ill LR 96, 116.

[72] Kaser, *Privatrecht* (n 31) vol. II, 670.

A further source of pressure or stimulus was superstition but also religious beliefs. And there was the pressure coming from the Church, including but not only because clergy often evidenced the making of wills and because, for instance, in England, the administration of the moveable estates was the work of the Church courts. The Church contributed significantly to the development of testamentary freedom. At first the Church supported the idea that clerics should be free to make testaments and later that this freedom would be extended to lay people to leave their estate to the Church or charitable purposes.[73] The Church also encouraged testamentary dispositions *pro salute animae*,[74] and thus had a role to play in the development of the dead's part. As mentioned above, the general expectation was that testators would make a will and one that would include a benefit for the Church.[75] And, at least in medieval England, lack of a will meant that the intestate had probably died unconfessed. This could apparently sometimes lead to a burial in unconsecrated ground.[76] And it seems that in some parts of continental Europe, the personal property of the intestate was forfeited to the feudal lord.[77] The fear of 'posthumous punishment' in whatever form could therefore be an effective tool to ensure that testators would act as they were expected to act. Another source of pressure but also stimulus to testate in a particular way, seems to have been tax legislation. Certainly, in Roman law, bequests to remote relatives or non-relatives carried tax liability.[78]

Societal and family pressure as well as tax incentives aside, there were also legal restrictions in place which were meant to ensure that testators would act responsibly. These took different forms. For instance, Roman law had strict formality requirements in place. These extended also to the content of the will. To be valid the will had to nominate an heir. And, while it was possible in the early Republic to disinherit sons who were in power when the will was made, the *paterfamilias* had to expressly name them for otherwise the will was invalid and intestacy rules applied.[79] Equally, the will was invalid if it omitted posthumously born *sui heredes*, that is *sui heredes* who had been conceived but not yet born at the time when the will was made or the testator died. Thus, at least in Roman law wills, could easily fail or be invalidated.

When towards the later Republic the social pressure was no longer sufficient to ensure responsible behaviour of the *paterfamilias* towards his family, Roman law developed the *querela inofficiosi testamenti*, that is 'the complaint concerning the undutiful will'. In other words, the testator's 'moral duty was translated into a legal remedy'.[80] The *querela* was a procedure whereby the validity of a will could be challenged by those who would have succeeded to the testator's estate had he died intestate. Among the various arguments used

[73] Rüfner (n 93) at 41.

[74] N Jansen, "Testamentary Formalities in Early Modern Europe" in Reid, de Waal and Zimmermann (eds), *Comparative Succession Law vol I* (n 40) 27, 31-2.

[75] J Unger, "The Inheritance Act and the Family" (1943) MLR 215, at 220.

[76] Sheehan, *The Will* (n 36) 232; But see Helmholz, *Oxford History* (n 36) at 405, and C Grittings, *Death, Burial and the Individual in early modern England* (1984). McMurray (n 71) at 117 suggests that the legal profession also had a role to play as it standardized the character of testamentary dispositions.

[77] C Gross, "The Medieval Law of Intestacy" (1904) 18 HarvLR 120 at 120.

[78] J Gardiner, "Nearest and Dearest. Liability to inheritance tax in Roman families" in S Dixon (ed), *Childhood, Class and Kin in the Roman World* (2001) 205 at 213. That in England tax aims to encourage certain behaviour, i.e gifts to charities or the spouses and civil partner is argued by J Brook, "Testamentary freedom – myth or reality?" 2018 (82) Conveyancer and Property Lawyer 19, at 23 ff.

[79] See also the praetorian modifications in the form of the *bonorum possession contra tabulas*.

[80] du Plessis, *Borkowski's Textbook* (n 69) 238.

(possibly as a rhetorical tool) was at first that a testator who had acted in this way must have been insane. Later the basis of the claim was that by making a will that omitted the applicant without good reason the testator had failed to comply with his moral duty (*officium pietatis*) towards them.[81] It therefore became important for testators to provide a good reason for omitting intestate heirs.

In English law, 'to cut off an heir "without a shilling" raised a presumption that the testator was legally incompetent'.[82] In fact, as some of the restrictions on the power to make a will were loosened in the course of the 19th century, wills started to be 'challenged on the grounds of lack of capacity, undue influence, lack of knowledge and approval, or lack of due execution.'[83] A for testamentary capacity itself, at first it seems to have been evidenced solely by the rationality of the will. And when the test for testamentary capacity was established in the seminal decision in *Banks v Goodfellow* in 1875, it was concluded that to ascertain a testator's mental competence, the testator was required to 'comprehend and appreciate' among other things 'the claims to which [the testator] ought to give effect'. [84] In other words, the testator must be aware of the existence of persons who might be considered to have a moral claim on the estate and potentially understand 'the closeness of his ties with potential beneficiaries and the nature of their claim',[85] as well as the nature of their claims. According to Lord Chief Justice Cockburn, 'though the law leaves to the owner of property absolute freedom in his ultimate disposal of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given.'[86] Thus, 'responsibility [was] built into the definition of testamentary capacity'.[87] Importantly, a moral claim could be advanced not just by nearest relatives, but also for instance by friends and those who provided faithful services.[88]

In addition to the possibility of contesting the will for lack of capacity, undue influence, lack of knowledge and approval or lack of formalities, there continued to be legal restrictions in place as to how much the deceased could freely dispose of. As for Roman law, as mentioned earlier, the *Lex Falcidia* ensured that if the deceased made legacies, the heirs who took under the will could receive no less than a quarter of the estate. Further, as we saw, until about the 14th century, in England, the deceased's legitimate children and the wife could each claim a third of the testator's moveable property and in some regions this restriction rested in place for much longer. While this restriction was abolished, since 1938,[89] in England, certain family members and dependants have been able to bring a claim against the estate if the testator

[81] Nicholas, *An Introduction* (n 59) 261.
[82] Chester, *Inheritance* (n 10) 12.
[83] Kerridge, "Freedom of Testation" (n 41) at 135. For developments in the US, see S Blumenthal, "The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America" (2006) 119 HarvLR 959, at 960.
[84] *Banks v Goodfellow* (1870) LR 5 QB 549 at 565.
[85] Sloan, *Law of Succession* (n 17) 80.
[86] *Banks v Goodfellow* (n 84) at 563. The moral component intrinsic to the testamentary capacity test is stressed by R Atherton, "Expectation Without Right: Testamentary Freedom and the Position of Women in 19th Century New South Wales" (1988) UNSW LJ 133 at 136 as well as by D Bedford and J Brook, "Reform of testamentary capacity: the hidden pitfalls or replacing *Banks v Goodfellow* with the Mental Capacity Act 2005" (2024) 140 LQR 34, at 37. According to Bedford and Brook (at 42) "the rationality (or otherwise) of the will is a *relevant factor* in ascertaining capacity."
[87] Atherton, "Expectation" (n 86) at 157.
[88] *Banks v Goodfellow* (n 84) at 564.
[89] Inheritance (Family Provision) Act 1938 now replaced by the Inheritance (Provision for Family and Dependants) Act 1975.

has failed to make adequate or reasonable provision for them. When evaluating the claim, courts must consider any legal or moral obligations that the deceased had towards the applicant. This is especially the case where the applicant is an adult child.[90] A testator's moral obligation towards adult children can arise not only because of their financial position, but also because of services that they have performed for the testator or promises that the testator has made to them.[91] Thus, in England, the testator's moral obligations toward certain family members and dependants became embedded not just in the concept of testamentary capacity but was also recognised in the context of the family provision legislation.[92]

### (3) A contingent and contested principle

The third point I would like to stress is that testamentary freedom did not develop in a linear or gradual fashion. As we just saw, the introduction of a certain level of flexibility through the recognition of a limited power to make a will over certain property was followed by restraints that were imposed by either legislatures or courts, or that were in fact self-imposed (for example, through family settlements) on the basis of both customs and/or social or family pressure and expectations. In turn, these restrictions were often met with attempts at circumvention which would then again lead to either a tightening or loosening of the restrictions. In other words, if one looks at the development of testamentary freedom over time and space, we see that it was subject to continuous changes and fluctuations.

We saw, for instance, that in Roman law a range of successive interventions followed one another and that the moral obligations to provide for the family were being turned into legal ones where this was regarded as necessary. We can also observe this in later developments on the European continent and up until the 19th century European codifications.[93] As Thomas Rüfner has shown, 'testamentary freedom was not a matter of course in the customary laws dominant Europe after the fall of the Roman Empire. Testaments had disappeared throughout western Europe and returned only during the Middle Ages'.[94]

While natural lawyers where in disagreement as to the precise roots of testamentary freedom,[95] some of them also saw it as instilled with responsibility. For instance, Locke, who

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[90] Sloan, *Law of Succession* (n 17) 332-7; R Kerridge, "Family Provision in England and Wales" in KGC Reid, MJ de Waal and R Zimmermann (eds), *Comparative Succession Law: vol III: Mandatory Family Protection* (2020) 384, at 397-402.

[91] A Braun, *Claiming a Promised Inheritance: A Comparative Study* (2022) 168.

[92] According to S Lenon and D Monk (eds), *Inheritance matters. Kinship, Property, Law* (2023) 11, '[t]he "capricious and vindicative wills" of husbands who failed to provide for their wives was a key motivation underlying the legal reforms'. See also R Atherton, "The Concept of Moral Duty in the Law of Family Provision – A Gloss or Critical Understanding" (1999) 5 Australian Journal of Legal History 5, at 9. As for Canada, see L Cárdenas, "Lines Drawn in Blood: A Comparative Perspective on the Accommodation of Blended Families in Succession Law" (2020) 65 McGill LJ 573, at 587 and Justice McLachlin's judgment in *Tataryn v Tataryn Estate* [1994] 2 SCR 807. According to J Finch, J Mason, J Masson, L Wallis and L Hayes, *Wills, Inheritance and Families* (1997) 24 '[t]he "responsibility" entailed in testamentary freedom lies in the expectation that it will not be used carelessly and the belief that wills normally protect the family.'

[93] T Rüfner, "Customary Mechanisms of Family Protection: Late Medieval and Early Modern Law" in Reid, de Waal and Zimmermann (eds), *Comparative Succession Law: vol III* (n 90) 39, 75-6; Landau (n 4) at 62-3; M Schmoeckel, "Luther's last will and the invention of testamentary freedom" in Rønning, Møller Sigh and Vogt (eds), *Donations* (n 58) 179.

[94] Rüfner (n 93) at 40. See also Meyer-Pritzl (n 17) at 207.

[95] For a discussion of the various positions held by natural lawyers, see D Klippel, "Familie v Eigentum. Die naturrechtlich-rechtsphilosophischen Begründungen von Testierfreiheit und Familienerbrecht im 18. Und 19. Jahrhundert" (1984) 101 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (GA) 117.

understood the liberty of disposition as part of individual property rights argued that this liberty 'sat within the allowance of law'.[96] Lord Stair, while taking the position that 'the first rule of succession in equity, is the express will of the owner', also recognised that '[i]t may be objected, that the will of the owner is not the rule of succession; because there lieth upon the owner a natural obligation to provide for his relations, not only during his life, but after his death.'[97]

The Prussian *Allgemeines Landrecht* of 1794 and the French *Code civil* of 1804 also viewed testamentary freedom with scepticism.[98] But this fluctuation is not unique to the development in civil law jurisdictions. It also applies to England, despite the fact that the prevailing narrative among common lawyers suggests otherwise.[99] In fact, as we noted earlier, certain relaxations that took place in the course of the 16th century were followed by new restrictions, and the same happened again in the 19th and 20th centuries. And just as was the case in Roman law, moral obligations were sometimes turned into legal ones.

Importantly, unlike freedom of contract, freedom of testation has never been regarded as untouchable. For instance, it came under serious attack by 19th century philosophers such as Hegel, who was against rooting inheritance in the rights of the individual property owner.[100] And, as is well known, French revolutionaries tried to abolish the freedom even though their attempt did not last long.[101] As for Germany, Anne Röthel has argued that 'on the eve of the German Civil Code, the question of whether a private right of inheritance existed was seriously discussed, and the historical justifications for testamentary freedom were considered comparatively fragile in relation to property and freedom of contract.'[102] Testamentary freedom is thus a contingent concept. Its history has not been one of inevitable and ever-greater triumph. It is, then, perhaps not unsurprising that the phrase or concepts of 'testamentary freedom', 'freedom of testation' or 'liberty of testation' seem to have emerged late. As Schmoeckel has shown, the Romans 'spoke of "freedom" only with regard to the slave who was granted his liberty by deed or the son who was relieved of parental tutelage. Roman lawyers did not treat the subject of creation of testaments as an individual freedom […]'.[103] As for England, neither courts nor legal writers seem to speak of 'freedom' until about the 19th century when the concept of 'freedom of contract' first emerged. Some scholars have

[96] J Locke, *Two Treatises of Government*, 2n edn (1967) chapter VI [57]. On the development of testamentary freedom in England, see Atherton, "Moral Duty" (n 92). At 24 Atherton states that: 'Philosophically the freedom [of testation] was located in a framework of moral responsibility, duty and obligation'.

[97] Stair, *Inst* III, 4, 2.

[98] Beckert, *Inherited Wealth* (n 1) 66. See also D Leipold, "Wandlungen in den Grundlagen des Erbrechts" (1980) 180 AcP 160 at 195: 'Bei genauer Betrachtung dürfe schon dem BGB nicht das Verständnis der Testierfreiheit als Freiheit nach Belieben zugrunde liegen, sondern als Freiheit zur pflichtgemäßen, gerechten Ausübung, aus der Verantwortung des Ehegatten und Familienvaters heraus.'

[99] Brook (n 78) at 20 who speaks of a gradual development; Atherton, "Expectation Without Right (n 86) at 133 who speaks of 'a gradual stripping away of the medieval restraints on a man's testamentary powers'. But see Kerridge, "Freedom of Testation" (n 41) for a different account.

[100] See Beckert, *Inherited Wealth* (n 1) at 53.

[101] For a discussion see Beckert, *Inherited Wealth* (n 1) at 35-36.

[102] Röthel "Ist es gerecht" (n 12) at 23.

[103] Schmoeckel (n 93) at 182.

in fact seen the development of this freedom as an historical accident.[104] It is thus unsurprising that some scholars prefer to speak of a power rather than freedom.[105]

### (4) Summary

To conclude this part, not only did the rules of intestacy precede testamentary freedom, for many centuries 'freedom of testation has been the exception rather than the rule.'[106] Throughout history elements of freedom were introduced in a punctual and piecemeal fashion as a response to the rigidity, or other perceived limits, of intestacy rules. In other words, where intestacy rules were considered unsatisfactory,[107] the will represented a means to provide for the particular circumstances of the deceased. Testamentary freedom cannot therefore be looked at in isolation from intestacy.

The analysis has further revealed that the capacity or power to make a will was not originally conceived of as a 'freedom' in the sense that we seem to understand it today, that is, as something to be exercisable in an arbitrary manner. It was conceived of as a 'capacity' or 'power' that was granted to certain people over aspects of their estate, and that was to be used to do the right thing and, even then, not just for their families. It is, then, perhaps not surprising that '[t]he countours of the notion of testamentary freedom are very largely, therefore, constituted by its limitations'.[108] And when during the 19th century the concept of testamentary freedom emerged, it seems to have expressed foremost of all 'freedom from State (or Crown) control in favour of individual determinism.' [109]

It was a power that was imbued with notions of responsibility and that was kept within bounds by societal, religious, fiscal and legal pressures and incentives. Hence, from a comparative and historical perspective freedom and responsibility have not been mutually exclusive.[110] This brings me to the last part of this article, that is what do we gain by bringing to the fore 'responsibility' as a core value underpinning succession law and using responsibility rather than freedom as our starting point?

## D. Why responsibility matters

It seems to me that shifting our focus onto responsibility has several benefits: (i) it opens up new and different ways of theorising succession law; (ii) it allows us to reconsider the nature and function of what are often perceived to be limitations or restrictions of testamentary freedom and to see them in a different light; (iii) it further allows us to provide a more

[104] GW Keeton and LCB Gower, "Freedom of Testation in English Law" (1935) 20 Iowa LR 326, at 339 argued that 'A review, therefore, of the history of testation suggests that our present rule has been attained largely by accident. At any rate, it can hardly be claimed as a fundamental principle of the common law, for in the case of land the common law refused to admit the principle and in the case of chattels it was worked out by the ecclesiastical lawyers.' Similarly, J Dainow, "Limitations on Testamentary Freedom in England" (1935-1940) 25 Cornell Law Quarterly 337, at 338.

[105] Papantoniou (n 17) at 394 speaks of a 'Befugnis'.

[106] WD MacDonald, *Fraud on the Widow's Share* (1960) 39.

[107] Unger (n 75) at 219. JG Miller, *The Machinery of Succession*, 1st edn (1977) 91.

[108] Zimmermann, "Freedom of Testation" (n 6) IX.

[109] Atherton, "Moral Duty" (n 92) at 15.

[110] Atherton, "Moral Duty" (n 92) at 25 acknowledges that '*Testator's Family Maintenance* legislation was developed in response to testamentary freedom, but not as a contradiction of it ... Testamentary freedom was based upon moral duty: it was a power with a 'moral responsibility.'

accurate rationale for the choices that legislatures make in the context of intestacy or default provisions applicable to wills, as well as judicial developments in other succession contexts, such as statutory wills; (iv) and it provides us with another justification for private succession. Let us look at each point in more detail.

### (1) The benefit of a relational approach

For a start, responsibility is a relational value.[111] As such it inevitably shifts our perspective away from the deceased's wishes and assets, and thus the patrimonial aspect of succession, onto the relationships of the deceased. In other words, it invites us to see succession law in relational terms and allows us to acknowledge that what happens to the assets is determined, to a significant extent, by these relationships.[112] This shift then broadens our view of the aims of succession law which are not merely to pass on wealth on death. In fact, succession law fulfils many different functions including a maintenance and therefore social security function, a dynastic function, a distributive function, a retributive or compensatory function as well as an expressive function. The concept of 'responsibility' thus makes us more alert to these various functions as well as the various values and interests other than the autonomy and the wishes of the deceased, including, for instance, continuity and stability, but also equality.

The relational approach further invites us to reflect on the effect that succession rules (and not just inheritance tax) have on these relationships, and how succession rules express, create and reproduce social relationships, including those with past and future generations. For instance, it invites us to reflect on how the existence and abolition of primogeniture has affected social structures, or how intestacy rules and mandatory family provisions influence our understanding of family and kinship.

A relational approach to succession law as suggested here also has other benefits. It prompts us to pay attention to how these relationships affect the behaviour of testators and what impact the testators' decisions have on these relationships both during the testators' lifetime and on their death.[113] We can then, for instance, acknowledge that decisions about inheritance, and the distribution of wealth on death more generally, are not merely based on economic considerations. We can further see that wills are not purely unilateral acts,[114] and

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[111] On the benefits of a relational approach to law more generally, see J Nedelsky, *Law's Relations* (2011). On the value of relational jurisprudence, see MT del Mar, "Relational Jurisprudence: Vulnerability between Fact and Value" (2012) Law and Method 63.

[112] Others before me have advocated a relational approach to inheritance, though from a different perspective. See, especially Kreiczer-Levy, "Property's Immortality" (n 17) and MG Leslie, "Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract" (1999) 77 NCL Rev 551 for whom inheritance is a reward for a previous relationship. The relational approach has also been applied to property law. See especially G Alexander, "The Social-Obligation Norm in American Property Law" (2009) 94 Cornell LR 745; J Nedelsky, "A Relational Approach to Property" in N Graham, M Davies and L Godden (eds), *The Routledge Handbook of Property, Law and Society* (2022) 325.

[113] For instance, the impact of disinheritance or omission from a will can be significant for those who won't benefit. H Conway, "Where There's A Will ... : Law and Emotion in Sibling Inheritance Disputes" in H Conway and J Stannard (eds), *The Emotional Dynamics of Law and Legal Discourse* (2016) 35; D Hacker, "Disappointed 'Heirs' as a Socio-Legal Phenomenon" (2014) 4 Oñati Socio-Legal Series 243.

[114] Braun, *Promised Inheritance* (n 91) 360. See also S Gosepath, "What, if anything, is wrong with bequests? A preliminary sketch" in Schmidt am Busch, Halliday and Gutmann (eds), *Inheritance* (n 9) 15 at 20 on the practice of bequest not being unilateral.

that just like gifts,[115] they are part of a wider and more complex social process. For instance, the decision-making of testators may depend on the behaviour, or reflect the aspirations, of previous generations. But it may also be determined by how others have treated or cared for them during their lifetime. Thus, wills can have a remunerative or compensatory character.[116] As Shelly Kreiczer-Levy put it, 'succession is a shared project'.[117]

This change of orientation onto the deceased's relationships also has potential implications regarding our understanding of the place of succession law on the map of private law. If we take a relational approach, we are more likely to see succession law as part of the law of persons and to acknowledge its interconnectedness not just with property law but also with family law, social security law and elder law.[118] This in turn affects what we regard as the core aims and principles of succession law.

### (2) Seeing 'restrictions' in a different light

Second, by re-valuing responsibility and by using responsibility rather than freedom as our starting point, as was indeed the case in the past, we can more easily see what are frequently regarded as undesirable 'restrictions' of testamentary freedom in a different light. Rather than considering them as restrictions that are borne out of a suspicion towards testamentary freedom,[119] and that detract from it, we can see them as natural expressions of the testator's embeddedness in a network of social relationships. We might then be able to perceive certain provisions as virtuous rather than 'limiting' or 'restricting'.

I am thinking here, for instance, of provisions that are aimed at protecting the interests of the deceased's dependants against disinheritance. More than limitations on the testator's freedom of disposition, these should be seen as a continuation of the testator's lifetime duties (whether legal or moral) that spring from the testator's relationships. Similarly, where legal systems find means to protect (for example, through proprietary estoppel), the interests of those who have worked or cared for the deceased in reliance on a testamentary promise made by the testator, these means should not be seen as infringements of the testator's testamentary freedom. Rather they should be seen as an expression of the fact that the deceased has voluntarily entered into a relationship of reliance.[120]

But we can also think of provisions that protect beneficiaries under a will from unreasonable or undue burdens and conditions that testators may wish to impose on them. To be a responsible testator does not merely mean that the testator may need to provide for those whom they have a relationship with, but also that they should not impose their own plans and projects on others where this is irresponsible.[121] The concept of responsibility also legitimises provisions that are aimed at safeguarding future interests from undue burdens, in the form of perpetuity rules. For it would be irresponsible to try to control the use of assets

[115] R Hyland, *Gifts: A Study in Comparative Law* (2009) 586; JT Godbout (in collaboration with A Caillé), *The World of the Gift* (1998) (D Winkler transl) 7.
[116] Braun, *Promised Inheritance* (n 91).
[117] Kreiczer-Levy, "Property's Immortality" (n 17) at 134.
[118] As to the boundaries of succession law, see GL Gretton, "Quaedam Meditationes Caledoniae: The Property/Succession Borderland" (2014) 3 European Property LJ 109.
[119] See Unger (n 75) 220 with regards to the *legitim*.
[120] Braun, *Promised Inheritance* (n 91) 8.
[121] Here see Alexander, *Human Flourishing* (n 27) chapter 4.

in perpetuity. After all, the relationship that testators have with more remote relatives are less strong.[122]

Importantly, by looking at these 'restrictions' or 'inroads' through a different lens we can then also see that testamentary freedom is not in opposition to responsibility. In fact, to allow testators to fulfil their responsibilities we may sometimes need to enhance the freedom they currently enjoy, for instance, so as to allow them to provide for those who have cared for them in old age,[123] or those (such as, for instance, stepchildren or cohabitants) who may not be provided for by the rigid inheritance rules (whether intestacy rules or mandatory family protection rules) which are usually based on kinship and formal status derived from marriage or adoption.

Responsibility as a concept does not extend only to and explain or justify family protection. It is, in fact, much more comprehensive. It can also extend to other relationships such as relationships of care or reliance (including with someone outwith the family) as well as relationships with the wider community in which the deceased has lived in. Thus, responsibility both explains and legitimises, for instance, contributions to the community in the form of the payment of inheritance tax, but also the distribution of assets to the state or the crown under intestacy laws.[124] And while it may be responsible for a testator to leave assets to charities, responsibility may also explain and justify why it is sometimes necessary to pose limits to or 'control' charitable giving (e.g. in the context of the reorganisation of charities or charitable trusts) for it can potentially contribute to an unreasonable perpetuation of the deceased's values and projects that are no longer in line with current moral standards,[125] the perpetuation of inequalities[126] or lead to wasteful dispositions.[127]

### (3) Abandoning the notion of the deceased's 'presumed intention'

As I mentioned at the beginning of this article, one consequence of prioritising testamentary freedom, and thus donor intent, has been that we have come to explain most of succession law, including many default rules in the context of both intestate and testate succession, through the deceased's intention. But this explanation is not always convincing nor satisfactory and, in some cases, entirely absurd. Examples are where the presumed intention clashes with the actual intention of the deceased, or the deceased lacks capacity to even form an intention.[128]

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[122] This is different from the argument whereby the property owner has no 'special knowledge about the propensities of his great-grandchildren' as argued by SE Sterk, "Jurisdictional Competition to Abolish the Rule against Perpetuities: RIP for the RAP" (2003) 24 Cardozo LR 2097 at 2114 in response to the 'testator knows best rule'.

[123] J Tate, "Caregiving and the Case for Testamentary Freedom" (2008) 42 U.C. Davis LR 129.

[124] AJ Hirsch, "Beyond Privity of Blood: Intestacy and Charity" (2025) 76 UC LJ (*forthcoming*) Available at SSRN: https://ssrn.com/abstract=4762037 suggests that intestacy rules should provide for contributions to charities.

[125] J Picton, "Regulating Egoism in Perpetuity" in J Picton and J Sigafoods (eds), *Debates in Charity Law* (2020) 53. Alexander, *Human Flourishing* (n 27) at 110-112 has argued that charitable gifts can sometimes be seen as infringing the testator's obligations towards future generations.

[126] M Perry Fleischer, "The morality of charitable bequests" in Schmidt am Busch, Halliday and Gutmann (eds), *Inheritance* (n 9) 36.

[127] AA Tait, "The Secret Economy of Charitable Giving" (2015) 95 Boston University LR 1663.

[128] See the examples mentioned above in the text at n 000. For a criticism, see A Braun, "Intestate Succession in Italy" in Reid, de Waal and Zimmermann (eds), *Comparative Succession Law: vol II* (n 21) 67 at 70.

By recognising responsibility as a core value of succession law, we can, I hope, move more easily away from relying on deceased's 'presumed intention' as a means of explaining or justifying not just intestacy rules but also default rules regarding wills that I mentioned earlier. Rather than resorting to fictions, we can then acknowledge that what these rules or doctrines do is reflect what society regards as an appropriate, that is a responsible, distribution of the deceased's assets.[129] It other words, they reflect what society thinks testators *ought to do*. As Christandl has shown, this is precisely how natural lawyers such as Grotius and, in particular, Pufendorf had interpreted the concept.[130] Thus, the concept of responsibility provides an explanation and justification not just for mandatory family provision,[131] but also many default rules including those in the context of intestacy. This move away from the deceased's presumed intention, then, allows us to shift the debate onto what a responsible distribution should look like rather than what a hypothetical or average testator would have wanted, which, as we saw, is difficult to establish. Furthermore, given the fact that intestacy rules and default rules have an expressive function,[132] it is crucial that we acknowledge responsibility as the true underpinning value.

Arguably, responsibility also offers a better explanation and legitimation of other developments in succession law. For instance, it can explain certain decisions that English courts have been making in the context of statutory wills. Statutory wills are wills executed under the authority of the English Court of Protection on behalf of persons who never had or have lost the capacity to make a will. Without being able here to go into much detail, prior to the Mental Capacity Act 2005,[133] when authorising a statutory will, the court tried to determine what the person would have decided themselves given their views, wishes and preferences when they had capacity. In some cases, there were previously settled testamentary wishes that could guide the court, but in others the person had never made a will or never had testamentary capacity. In such instances the court would make assumptions about those wishes along the lines that the person would, for instance, have 'felt moral obligations to show recognition to the community (in which she lived) and her family'.[134]

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[129] This explanation is also more in line with the duty theory that is sometimes referred to in American legal scholarship. See especially RJ Scalise Jr, "Honor Thy Father and Mother?: How Intestate Law Goes Too Far in Protecting Parents" (2006) 37 Seton Hall LR 171. For Italy, see Braun "Intestate Succession" (n 128) at 70.

[130] See Christandl (n 22) at II.A for whom presumed intention is a normative concept that can accommodate various policy goals and that is not to be seen as an alternative to the duty theory. Both refer to what the testator ought to have intended. However, Reid, de Waal and Zimmermann (n 21) at 446 take the view that 'presumed intention is more than just a label for results achieved by other means.'

[131] For Cárdenas (n 92) at 590 family duty is the foundation of forced heirship. KGC Reid, "Legal Rights in Scotland" in Reid, de Waal and Zimmermann (eds), *Comparative Succession Law: vol III* (n 90) 417, at 442 argues that the accepted basis for legal rights in Scotland lies in the natural obligation of a testator to provide for his relations and that the moral obligation was 'made an obligation enforceable in law so as to remove the temptation of non-compliance.'

[132] AJ Hirsch, "Default Rules in Inheritance Law: A Problem in Search of Its Context" (2004) 73 Fordham LR 1031, at 1035 and EG Spitko, "The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion" (1990) 41 Arizona LR 1063, at 1100.

[133] Administration of Justice Act 1969, s 17, amending the Mental Health Act 1959. For an exploration of the historical roots of the legislation, see RC Croucher, "'An Interventionist, Paternalistic Jurisdiction'? The place of Statutory Wills in Australian Succession Law" (2009) 32 UNSW LJ 674, at 675-78.

[134] *In re C (A Patient)* [1991] 3 All ER 866, 870 (Hoffman J) further said that 'the court must assume that she would have been a normal decent person, acting in accordance with contemporary standards of morality.' Critical of the judgment and, in particular, the fact that it is not in line with the decisions of average testators at the time is R Harding, "The Rise of Statutory Wills and the Limits of Best Interests Decision-Making in Inheritance" (2015) 78 MLR 945, at 954.

The 2005 Act moved the focus away from an approach of substitutive judgment to an approach that focuses on the incapacitated person's 'best interests'.[135] However, in *Re P (Statutory Will)* Lewison J noted that 'for many people it is in their best interests that they be remembered with affection by their family and as having done "the right thing" by their will'.[136] And, in *Re M (Statutory Wills)* the Court of Protection accepted Lewison J's approach and asserted that '[b]est interests do not cease at the moment of death. We have … an interest in how we will be remembered'.[137] Equally, in *In the Matter of Peter Jones* the court asserted that in the absence of evidence to the contrary, it is entitled to assume that the person would have wanted to make a will and that 'most people want to do the right thing by their family and loved ones'.[138] Thus, while in 2005 the test changed to the 'best interests', the assumption that the person wanted to do the 'right thing' with respect to those whom the person was perceived as having a moral obligation to provide for does not seem to have disappeared from case law. By acknowledging responsibility as a core value, we can more easily concede that what the court actually does in these cases is to endorse a distribution in line with what it regards a responsible distribution, and thus what the testator *ought* to have done.

Responsibility can also offer a different and better explanation for why, for instance, US judges are more likely to strike down wills in which testators benefit non-relatives. Such wills are sometimes described as unnatural or irrational, or assumed to be the consequence of undue influence.[139] In England, too, courts seem to have been more sceptical of wills that disinherit close family members.[140] It could be argued that what the courts are doing is to strike down wills that they regard as not in keeping with the testator's responsibilities towards their family. Conversely, courts have a tendency to uphold charitable bequests even when they are uncertain or vague. Thus, responsibility offers a richer more plausible normative basis not just for a number of default rules of succession law – both in the testate and intestate context – but also for certain judicial developments that are ultimately aimed at ensuring that testators fulfil their legal and moral obligations.

### (4) Responsibility as a better way of justifying private succession

Finally, responsibility can also offer another and perhaps better justification of private succession that is not rooted in the deceased's property rights, or in the rights and entitlements of certain family members,[141] or the recognition of posthumous rights.[142] For a start, it could be argued that we need private succession, and a certain amount of flexibility, so that testators can act responsibly and provide for the relationships they have nurtured during their lifetime in ways that intestacy rules cannot necessarily do, because they cannot

[135] For an analysis of the changes, see Harding (n 134).
[136] *Re P (Statutory Will)* [2009] EWHC 163 (Ch); [2010] Ch 33, [44].
[137] *Re M (Statutory Will)* [2009] EWHC 2525 (Fam); [2011] 1 WLR 344 (also known as *ITW v Z*), [38].
[138] *In the Matter of Peter Jones* [2014] EWCOP 59, [67].
[139] The literature is vast. See especially R Scalise Jr, "Undue Influence and the Law of Wills: A Comparative Analysis" (2008) 19 Duke Journal of Comparative & International Law 41; M Leslie (n 112), and Kreiczer-Levy, "Property's Immortality" (n 17) at 120.
[140] Hedlund (n 19) at 5.
[141] JE Penner, "Intergenerational Justice and the 'Hereditary Principle'" (2014) 8 Law & Ethics of Human Rights 195.
[142] R Lamb, "The Power to Bequeath" (2014) 33 Law and Philosophy 629.

cater for each specific situation. This is not to argue that testators necessarily know best, but rather that they need to be able to fulfil their legal and moral obligations when this is not achieved otherwise, as for example through intestacy laws.[143]

In addition, testamentary responsibility can also explain why we honour the wishes of a person even though she is dead. We do soprecisely because she has behaved responsibly, without having to engage with the question of whether she has posthumous interests or rights.

## E. Conclusion

By taking a comparative, historical and contextual perspective, this article has shown that there is nothing inevitable or self-evident about testamentary freedom. Rather, testamentary freedom is a contingent concept and one that has a complex history which is not characterised by a linear development of inevitable growth. In fact, the story is marked by a continuous fluctuation, a continuous loosening and fastening of the power to make a will which did not necessarily extend to the entire estate and was certainly not granted to everyone. The introduction of elements of freedom was frequently a reaction to the rigidity and inevitability of succession structures and should thus be seen in strong connection with and against the background of intestacy rules. This is true as much for developments in continental civilian jurisdictions as for developments in England. We have also seen that restraints concerning the disposition of assets were not just anchored in legal interventions. Legal restrictions were often needed only when moral obligations were no longer regarded as sufficient.

The approach taken in this paper has further illustrated that despite common perceptions and prevailing narratives, responsibility as a value has underpinned developments in both legal traditions, even if English law has not adopted a system of compulsory or forced heirship. Thus, the narrative whereby the 'English, and by extension the common law, tradition is one in which individualism has reigned … [and] [t]he civilian tradition, in contrast, […] one in which family reigns' is too simplistic.[144] It is also not in line with general practice. Most testators tend, in fact, to act responsibly irrespective of the amount of freedom they have.[145] This is probably why some legislatures (e.g. the English) have based their intestacy rules on the study of wills.[146] Also, as Gilden has shown, freedom of disposition is not the only model in the area

[143] My position is thus somewhat different from Miller who defends testamentary freedom on the basis of the morality of gift relationships. According to Miller (n 9) at 194, 'testamentary freedom matters morally for testators in part because it enables them to effectively express morally sound motivations towards persons and causes favoured in a mechanism for testamentary disposition.' My point is not so much that it is morally important for testators, but rather that they ought to behave responsibly because of their relationship with others.

[144] RF Croucher, "How free is free? Testamentary Freedom and the Battle between 'Family' and 'Property'" (2012) 37 Australian Journal of Legal Philosophy 9, at 25.

[145] Bauer, *Die innere Rechtfertigung* (n 8) 163. See also D Hacker, "The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought" (2010) 7 Journal of Empirical Legal Studies 322 arguing that disinheritance of children is the exception. M Sussman, JN Cates, DT Smith, *The Family and Inheritance* (1970) 7: 'In practice, however, will makers conform, by and large, to cultural prescription of familial responsibility over generational time.' See Kreiczer-Levy, "Property's Immortality" (n 17) at 115: 'Estate plans…reflect testators' responsibilities'; R Probert, "Freedom of Testation in Victorian England" in K Boehm, A Farkas, and A-J Zwierlein (eds), *Interdisciplinary Perspectives on Aging in Nineteenth-Century Culture* (2014) 115 at 127. See also Finch et al, *Wills,* (n92) 73 and J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (2000) 67 ff who confirm that distribution is not entirely random. The kin group is dominant.

[146] This is the case of the English Administration of Estates Act, 1925. See Unger (n 75) at 222.

of the laws of legacy.[147] For instance, copyright law and publicity rights law but also digital assets are regulated by different models of stewardship.

One could argue that if testators already behave responsibly, why not provide them with absolute freedom of testation? The answer to that is that historical developments show us that social pressure alone will not always suffice. The existence of legal boundaries can remind testators of their responsibilities[148] and thus shape their behaviour. As others have already pointed out, succession law has an expressive function.[149]

This article therefore disagrees with Meston's view according to which '[m]aking a will is an exercise of power without responsibility'.[150] Rather it shows why it is important to place responsibility at centre stage as a core value and starting point. Also, responsibility as a concept does not just explain and justify provisions for the deceased's closer family. It is a comprehensive concept that also legitimises contributions to the deceased's wider community. Ultimately, it provides a normative concept that is capable of explaining both testate and intestate succession.

Of course, how the law can and should encourage or ensure that testators act responsibly but also how we determine what is required from testators, and which relationships trigger responsibility, are important and difficult questions, but they are, the topic for further research.

[147] A Gilden, "The Social Afterlife" (2020) 33 Harvard Journal of Law & Technology 329.
[148] Reid "Legal Rights in Scotland" (n 131) at 442.
[149] On the expressive function of succession law see, especially, Spitko (n 132) and Hirsch (n 132).
[150] M Meston, "The Power of the Will" [1982] Juridical Review 172, at 173.