

Sentimental Value: Keeping Inheritance in the Family

Abstract

Inheritance is often guided not only by property's monetary value, but the sentimental attachment formed towards it and the consequential desire to keep such emotionally valued property "in the family". The significance of the property to the owner and their family means that they will not want to sell or voluntarily depart with it, a finding particularly prevalent across socio-legal scholarship and in the context of property loss and generational property related case law. The importance of inheritance goes beyond simply ensuring financial security for those left behind, but ensuring property of emotional value to the testator remains with their family. This chapter therefore evidences how sentimentality influences testator choice and how sentimental attachments to property may infer for some rights of inheritance over property.

Introduction

Inheritance laws predominantly prioritise familial beneficiaries.¹ Qualitative research using will samples has also found that the majority of testators leave property 'exclusively to kin...[with] will-makers in England...favour[ing] family members in their bequeathing decisions despite the [law providing] considerable freedom to bequeath'.² Keeping property in the family is therefore an important consideration in law and for some testators, with will-making permitting a person greater control over the disposition and division of their estate.

¹ For example, see the intestacy rules in section 46 of the Administration of Estates Act 1925 (AEA 1925), and section 1 of the Inheritance (Provision for Family and Dependents) Act 1975 (1975 Act).

² J Finch et al, *Wills, Inheritance, and Families* (OUP 1996) 73

Property, both real and personal, may be imbued with monetary and sentimental value. Many will be sentimentally attached to property that they own, even that which carries little to no monetary value. Sentimental attachments to property, and particularly to inherited property, are recognised across international socio-legal scholarship and within the common law of England and Wales.³ The influence sentimental attachments have on guiding decisions when will-making is consequently recognised and inferred. Will-making, in particular, is a means of extending sentimentality into the future, of passing property to those who testators know, or at least hope, will treasure it most or understand best the meaning of the property transferred. Some property transferring on death will be sentimental only, such as photographs of loved ones. Other property will have mixed value, such as jewellery, and there may be property which, to an objective observer, seems worthless, but to those inheriting the same will be worth more than money or gold.

Although sentimental attachments to property are recognised, inheritance laws have largely leaned in favour of monetary considerations when assessing inheritance rights. Key to inheritance law is that dependants of, and those closest to, the deceased are not suddenly without essential support as a result only of that person's death. The intestacy rules developed from earlier tripartite rules governing distribution of personal chattels to those closest to the deceased, namely the spouse and heir. The right of dower also subsequently provided the surviving widow with a life interest in her

³ Some cases of relevance from Northern Ireland will also be considered.

husband's realty, so as to prevent her from becoming homeless.⁴ As homogenous family norms changed, similar considerations fuelled amendments to financial provision and maintenance legislation, expanding to include a broader category of relationships likely to be dependant on the deceased and in need of financial protection on their death.⁵ Many beneficiaries, however, particularly those who inherit personal chattels, will have no intention of selling on their inheritance to realise its value; the monetary value of the property being of little to no consequence. They will instead keep the same as a token or memento of the deceased, of their life together or their shared family heritage. Monetary valuations can help for insurance purposes during estate administration, or to determine an even split of the estate between entitled beneficiaries, but the loss of assets of irreplaceable sentimental worth can arguably never be wholly insured against, and their loss on inheritance may be equally tough to bear, because of the sentimental attachment individuals form towards such property.

As inheritance cases most often concern questions of monetary division and financial support, relatively few refer to sentimental attachments to property. Items of pure sentimental value, that is property with little to no monetary value, cannot satisfy a debt, pay a tax liability, or achieve reasonable financial provision for a beneficiary or a dependant. Disputes over such property therefore rarely ever trouble the courts and yet their "worth" will be at the heart of many a private family dispute.

⁴ For it was introduced to protect a widow rather than a widower. See AWB Simpson, *A History of the Land Law* (2nd edn, OUP 1986) 68-70

⁵ 1975 Act, s 1(1). See also additions made by the Civil Partnership Act 2004, Marriage (Same Sex Couples) Act 2013, and The Civil Partnership (Opposite-sex Couples) Regulations 2019.

The expense of litigation, and the rule that costs generally follow the event,⁶ deters legal action where the property in dispute has minimal monetary value. The law also provides limited legal resolutions for disputes over such property and beneficiaries are, therefore, largely left to negotiate the distribution between themselves, with assistance perhaps from the estate's Personal Representatives. This is why solicitors recommend testators include clauses in their wills to mitigate these situations.⁷ In the absence of agreement between beneficiaries the law can simply offer a monetary means of resolution; that items within the estate be valued and sold, and the proceeds distributed in accordance with the will or intestacy.

Inheritance law's deference to financial support of beneficiaries and financial resolutions, however, harbours an understated and oft ignored aspect of inheritance; the transfer of property carrying sentimental value to those who were close to the deceased, and who can appreciate best the meanings attached to the property. Whilst the transfer of a home or sufficient funds to prevent hardship after the death of a provider or contributor to finances is important, the transfer of irreplaceable sentimental property is an additional consideration, and for some will be a fundamental aspect of inheritance and will-making. It is therefore an issue that the courts must sometimes address. This chapter will first consider the definition of "sentimental attachment", garnered from both social-legal scholarship and case law, and then turn to consider evidence of its impact on will-making decisions.

⁶ Civil Procedure Rules, Rule 44.2(2)(a)

⁷ Practical Law, 'Will clause: personal possessions gift, category of items to divide by agreement or equally by value' *Thomson Reuters, Private Client* at <<https://uk.practicallaw.thomsonreuters.com/4-506-4235>>

1.1 What is Sentimental Attachment?

Case law and socio-legal scholarship collectively offer a multi-faceted and shared definition of the concept of “sentimental attachment”. The concept is comprised of the following elements: 1) length of property ownership;⁸ 2) subjective associations and involvements with the property;⁹ 3) objection to sale of the property;¹⁰ and 4) emotional harm upon the property’s loss.¹¹ The concept’s application in case law particularly demonstrates its significance as a recognised value of ownership. Even though inheritance disputes most often concern items holding monetary value, such property may also carry great sentimental value, and this has proved influential to the judge’s reasoning. Sentimental attachment to property is also recognised in cases concerning property loss, disposal or division, such as divorce proceedings or trust law cases, especially where the property concerned has itself been inherited. Application of each characteristic of the concept assists to demonstrate an accepted definition of sentimental attachment and highlights a shared understanding.

⁸ For example: *Urry v Williams and James* (Fam, 1 March 1991); *Y v Y* [2012] EWHC 2063; L Cuba and D Hummon, ‘A Place to Call Home: Identification with Dwelling, Community, and Region’ (1993) 34 *The Sociological Quarterly* 111; T Ulen, ‘The Public Use of Private Property: A Dual-Constraint Theory of Efficient Government Takings’ in N Mercurio, *Taking Property and Just Compensation: Law and Economics Perspectives of the Takings Issue* (Kluwer Academic Publishers 1992) 167; and A Grubbström, ‘Emotional Bonds as Obstacles to Land Sale - Attitudes to Land Among Local and Absentee Landowners in Northwest Estonia’ (2011) 99 *Landscape and Urban Planning* 31

⁹ For example: *Butler v Butler* [2016] EWHC 1793; *Sharp v Adam* [2005] EWHC 1806; and H Conway and J Stannard, ‘Property and Emotions’ (2016) 8 *Emotion Review* 38

¹⁰ For example: *Abbey National Plc v Moss* [1994] 1 FLR 307; *WS v WS* [2015] EWHC 3941; J Nadler and S Diamond, ‘Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity’ (2008) 5 *J Empirical Legal Stud* 713; and Grubbström (n 8)

¹¹ For example: *WS* (n 10); K Erikson, *Everything in its Path* (1976) in Cuba and Hummon (n 8) 115; and M Svašek, *Postsocialism: Politics and Emotions in Central and Eastern Europe* (Berghahn Books 2006) 77

1.1.1 Length of property ownership

Sociological scholarship has emphasised the development of sentimental attachment based on length of ownership. For example, Cuba and Hummon explain that long term residence encourages the development of sentimental attachments and a sense of 'home', imbuing the property with personal meanings, which arise over time with the accomplishment of life experiences;¹² the longer the residence, the more life events associated with the home, and the stronger the emotional bonds to the property.¹³ Ulen and Grubbström similarly found that an emotional bond arises from the historical family connections associated with property,¹⁴ demonstrating the significance of length of ownership to the development of sentimental attachments. Case law also highlights this characteristic as an underlying factor. As noted, these cases do not always relate to inherited property, but they evidence a consistent consideration of sentimental attachment, applicable in all cases.

In *Urry* (1991), a case concerning professional negligence arising from earlier divorce proceedings, the plaintiff wished to have the home she had lived in for 35 years transferred into her name.¹⁵ The judge noted that this seemed 'irrational because the house was...in a poor state of repair and costly to maintain', but acknowledged the reason was that she held 'a great sentimental attachment to the house in which her two children grew up'.¹⁶ Similar recognition of sentimental attachment to property in light of the length of ownership was given in *Englefield*

¹² Cuba and Hummon (n 8) 115 and 119-120

¹³ *ibid*

¹⁴ Ulen (n 8) 167; Grubbström (n 8)

¹⁵ *Urry* (n 8)

¹⁶ *ibid* (Rattee J)

[2005], which concerned a reversionary interest in a home.¹⁷ The settlor accepted the property had to be sold, 'albeit reluctantly, because of her emotional attachment to the property which ha[d] been her home for...forty years'.¹⁸ Although recognising that length of ownership can create sentimental attachments, the judges in both cases reverted to practical non-sentimental judgments. Sentimental attachments were, however, acknowledged and used as explanations for the decisions taken by the parties in these cases, and, as will be seen, recognition of sentimental attachments can prove influential in other judgments.

Length of ownership is also cited in family and divorce cases concerning inherited property. The case of *Y v Y* [2012] concerned a financial order following the parties' marriage breakdown and included inherited assets.¹⁹ In determining the division of property, the court noted the 'obvious sentimental value' that attaches to personal property such as family antiques, which the owner considers 'sacrosanct' given the length of time such assets have been in the family.²⁰

Recognition of this kind of sentimental attachment is particularly highlighted in divorce settlement cases that involve agricultural property, property particularly renowned for its generational ownership.²¹ An example of this is *P v P* [2005], which concerned a claim for ancillary relief by a divorcing wife for a 40 percent share in the

¹⁷ *Englefield & Cohn v Steinberg* [2005] EWHC 943. See also *Fusco v Georgiou, Georgiou and Homecircle* [1994] CLY 1527.

¹⁸ *Englefield & Cohn*, *ibid* [7] (Smith J)

¹⁹ *Y v Y* (n 8)

²⁰ *ibid*, 929-930

²¹ H Conway and J Stannard, *The Emotional Dynamics of Law and Legal Discourse* (Bloomsbury Publishing 2016) 43

husband's inherited farm, now in the fourth generation of the family.²² To grant a 40 percent share the farm would have to be sold, which would have been 'devastating for the husband'.²³ The court made an alternative award of 25 percent, which was achievable without the need to sell.²⁴ Although the award was held to have been based on the wife's reasonable needs for accommodation and income,²⁵ prominence was also placed on the farm's inherited nature, with the court holding that, although 'the fact that certain property [is] inherited will [often] count for little...[o]n other occasions [it] may be of the greatest significance.'²⁶ The court acknowledged here that generational estates may be treated differently from other assets in this context, so as to provide the inheritor with the greater share of such property,²⁷ and thereby giving weight to sentimental attachments based on length of ownership within a family line. The fact property is inherited, however, is just one factor for the court to consider, and it 'can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to [the inherited] property.'²⁸

The Northern Ireland case of *Donnelly* [2010] further highlights that although sentimental attachment may be influential, it may not protect the inherited property.²⁹ *Donnelly* also concerned ancillary relief in which the inheritor of a family farm had 'a strong emotional attachment' to it, and which he 'hoped...could be retained for future

²² *P v P (Inherited Property)* [2005] 1 FLR 576

²³ *ibid* [44] (Munby J)

²⁴ *ibid* [48]

²⁵ *ibid* [44]

²⁶ *ibid* [37]

²⁷ *ibid*; and see *White v White* [2001] 1 All ER 1

²⁸ *White* (n 27) 14 (Lord Nicholls)

²⁹ *Donnelly v Donnelly* [2010] NI master 5 (Northern Ireland)

generations.³⁰ The judge found this to be 'wishful thinking', as no future generation had shown an interest in taking over the farm.³¹ Further, sentiment alone would not prevent the distribution of inherited property 'in a needs-based case where the needs' of one party, as here, could only be met 'by recourse to the inherited property.'³² The case highlights again, however, that sentimental attachment accruing through length of ownership is at least a factor to be considered, as too is retaining property intact for future generations, even if it is not always possible to wholly protect the same.

Sentimental attachment accrued through length of ownership may, however, be effective where financial needs can be met from other sources. *Y v Y* similarly held that a factor to consider when determining equal division is how long property has been held in the family,³³ but noted that inherited property can be categorised as 'non-matrimonial...[placing] it in a special category [which] the court should be slow to invade...without good reason'.³⁴ This demonstrates the recognition of inherited property's sentimental value. It also recognises something deeply rooted historically within inheritance laws more generally; the orchestration of property transfer so as "to keep it in the family". This was also highlighted in *P v P* in which it was said that:

'[f]airness may require quite a different approach if the inheritance is a pecuniary legacy that accrues during the marriage than if the inheritance is a landed estate that has been within one spouse's family for generations and has

³⁰ *ibid* [14] (Master Bell)

³¹ *ibid* [32]

³² *ibid* [42]

³³ *Y v Y* (n 8), [28] (Baron J)

³⁴ *ibid*

been brought into the marriage with an expectation that it will be retained *in specie* for future generations.³⁵

The court therefore acknowledges intentions, even historic testators' intentions, to pass property through different generations so as to "keep it in the family".

These intentions are reminiscent of primogeniture, and also of the common law's development of entails utilised by landed families to keep estates together for the benefit of the settlor's family, and resettled to suit a family's needs, as well as to keep property out of the hands of unsuitable marriage prospects.³⁶ Whilst these sought to protect generational property predominantly for the benefit of male family members, especially in regard to aristocratic landed estates,³⁷ inheritance laws today are less gendered, but the historic notion of retaining property for future generations remains a prevalent undercurrent in judicial decision-making, as well as will-making, today.³⁸ Length of ownership by individuals, and particularly across generations, is clearly recognised by the courts as giving rise to sentimental attachments.

1.1.2 Subjective associations and involvement with property

The second accepted characteristic of sentimental attachment to property is the memories of, and an individual or family's association and involvement with,

³⁵ *P v P* (n 22), [37]

³⁶ Simpson (n 4); E Spring, 'The Settlement of Land in Nineteenth-Century England' (July 1964) 8(3) *American Journal of Legal History* 209; and Rebecca Probert, 'Control over Marriage in England and Wales, 1753-1823: The Clandestine Marriages Act of 1753 in Context' (2009) 27(2) *Law and History Review* 413

³⁷ For example, see the below discussion of *Re Bathurst* [2018] EWHC 21 (Ch)

³⁸ See section 1.2 below. Consider also the continued inclusion and upholding of conditional gifts.

property. Memories associated with property have been upheld as a factor indicative of a property's sentimental value, particularly demonstrated in judgments concerning inheritance. For example, in the cases of *Butler* [2016] and *Sharp* [2005], considered further below, when determining the division of items left in a will, the court recognised sentimental attachments given the memories associated with the property.³⁹ Sentimental attachments formed through familial involvement with property have also been deemed by the court to be 'genuine and rational'.⁴⁰

Significant milestone events and memories shared within the home are also upheld by the courts as an identifying feature of property's sentimental value. For example, the seminal events of marriage and the growth of a family are recognised as attributing sentimental importance to property.⁴¹ In *R v Franks* [2012] a home burglary resulted in items of 'high sentimental value' being stolen,⁴² including wedding rings, an action the court said caused a 'significant degree of loss to the victim and greater harm',⁴³ which 'may be more relevant to the issue of culpability'.⁴⁴ Case law therefore acknowledges that emotional attachments arise from memories associated with property.⁴⁵

Memories are also a recognised definitional characteristic of sentimental attachment in socio-legal scholarship. For example, Conway and Stannard affirm

³⁹ *Butler* (n 9); *Sharp* (n 9). See section 1.2.2 below for further discussion of these cases.

⁴⁰ *Butler* (n 9), [78] ((Barker HHJ, QC)

⁴¹ *R v Franks (Steven John Joseph) & Ors* [2012] EWCA Crim 1491; *Urry* (n 8)

⁴² *Franks*, *ibid* [17] (Hambleton J)

⁴³ *ibid* [10]

⁴⁴ *ibid* [17]

⁴⁵ See also *Vajpeyi v Yusuf* [2003] All ER 128, [38] and [41]

sentimental attachment to inherited property, noting that desires to retain ownership within the family are motivated by the ongoing association with the decedent when sentimentally valued property is left to family members through a will; the property is now deemed to symbolise the deceased and holds a repository of memories for those to whom it is gifted.⁴⁶ Furthermore, media reports also endorse this definitional characteristic, for example, noting that property becomes imbued with sentimental value given the memories and legacy associated with it,⁴⁷ particularly if the property has been passed down by a family member.⁴⁸

The actions of individuals towards their property are also recognised by the courts as giving rise to a sentimental attachment since, if one has built the property or is actively undertaking its maintenance and improvement, such actions reflect care and effort. For example, in *MacDonald* [2009] the claimants sought to rely on proprietary estoppel to establish an interest in their late father's estate, in the course of which it was recognised that *inter vivos* financial arrangements between the claimants and the deceased had been designed so that the deceased and the claimants' mother could remain in the home they had 'built...[as] it had sentimental value'.⁴⁹ Thus, the time and effort expended in a property's development, and the distinct memories and involvement associated with it, can be used to signify its sentimental value.

⁴⁶ Conway and Stannard, 'Property and Emotions' (n 9) 41

⁴⁷ J Moorhead, 'Marie Kondo: How to Clear Out Sentimental Clutter' *The Guardian* (14 January 2017) at www.theguardian.com/lifeandstyle/2017/jan/14/how-to-declutter-your-life-marie-kondo-spark-joy

⁴⁸ M Gardner, 'A Tempest Brews in Heirloom Teacups' *Christian Science Monitor* (14 April 2004) at <https://jsh.christianscience.com>

⁴⁹ *MacDonald and Another v Frost* [2009] EWHC 2276, [93]

Subjective associations and involvement with property is therefore a recognised characteristic of sentimental attachment. Inherited and familial property particularly holds memories associated with the deceased and emotional connections are created over time by mutual involvement with the property or because of its association with the deceased.

1.1.3 Objection to the sale of property

Another defining feature of sentimental attachment to property recognised in case law is that the owner or beneficiary who has formed a sentimental attachment will not want to part with such property given its irreplaceable value. Property loss cases arising out of family disputes particularly highlight objections to the sale of sentimentally valued property. For example, in *Abbey National Plc v Moss* [1994] the family home was placed into the joint names of a mother and her daughter to ensure it would not be sold in the mother's lifetime, an action the court deemed to be motivated by the property's sentimental value; '[i]t was [the mother's] only home and she had a strong sentimental attachment to it and particularly to the memory of her husband...[an] almost painful attachment'.⁵⁰ This connection between sentimental attachments and a reluctance to sell, or a need to protect from sale, was further noted in *WS v WS* [2015], in which the court had to determine which items were to be sold during divorce proceedings.⁵¹ The court noted that the husband's actions 'seemed...largely motivated by an emotional attachment to the property...and by a

⁵⁰ *Abbey National Plc* (n 10) 309

⁵¹ *WS* (n 10)

wish to give the children a chance to retain' the property.⁵² This attachment guided determinations as to which items should be sold, and which should remain in the ownership of those who sentimentally valued them.⁵³

Scholars further note how the reluctance to sell property is informed by attachments developed over years, and so can be dependant on another characteristic of sentimental attachment; length of ownership.⁵⁴ Nadler and Diamond's study reveals that the longer property is held, the more likely a person was to refuse its sale.⁵⁵ Grubbström also found that the implication of developing a strong attachment to land is the reluctance to sell it, since emotions act as a constraint against sale.⁵⁶ This has been supported in media reports of individuals who, due to their sentimental attachment, refused to sell their property. Examples include widows who refused to sell the home because of the memories it held and despite it being an 'eyesore',⁵⁷ to articles noting that sold homes are examples of property to which the owner did not possess an emotional attachment;⁵⁸ the sale of the home inferred that a sentimental attachment did not exist since the owners were instead happy to part with it and felt no great pain on its loss. This is demonstrative of a more widely shared understanding of this key characteristic of sentimental attachment, beyond academia and outside the court.

⁵² *ibid* [22] (Meston HHJ, QC)

⁵³ *ibid*

⁵⁴ See section 1.1.1 above.

⁵⁵ Nadler and Diamond (n 10) 731, 732-734, and 736

⁵⁶ Grubbström (n 8) 31 and 36

⁵⁷ J Barbanel, 'Sale of "Eyesore" to end Nightmare on West 76th' *Wall Street Journal* (6 September 2014) at www.wsj.com

⁵⁸ 'Inside Pregnant Cheryl's Mansion with Liam' *Mail Online* (3 March 2017) at www.dailymail.co.uk/tvshowbiz/article-4278076/Cheryl-puts-Hertfordshire-home-market-19k-month.html; S Horne, 'Debt Levels Force More Landowners to Sell up' *Farmers Weekly* (26 July 2013) at www.fwi.co.uk

1.1.4 Emotional harm on property loss

Another recognised characteristic of sentimental attachment to property, tied also to a reluctance to sell property imbued with the same, is the emotional harm that accompanies the property's loss. Recognition of the harm caused arises in all cases, as already demonstrated in cases concerning both voluntary and involuntary loss and division of property. The judicial language utilised within *WS*, *Donnelly*, and *Franks* particularly emphasises the emotional impact of losing property of sentimental value,⁵⁹ highlighting the greater loss and 'devastat[ion]' that can arise where, and should, such loss occur.⁶⁰ Emotional harm is a logical consequence of the loss since sentimental property is identified by the courts as that which the owner will not want to lose given its emotional importance, with any loss thereby being significantly felt by those affected.

This characteristic of sentimental attachment is also evidenced in media reports, which highlight the strong emotional reactions that follow the loss of sentimentally valued property. Such loss is described as 'heart wrenching' given the significant emotional weight afforded to the property,⁶¹ and the distress caused has been deemed 'unimaginable'.⁶² Given the memories and life events associated with

⁵⁹ *WS* (n 10); *Donnelly* (n 29); and *Franks* (n 41)

⁶⁰ *Donnelly* (n 29), [30]

⁶¹ 'Jewellery's Value Lies in its Emotional or Sentimental Worth' *The Guardian* (12 February 2014) at www.theguardian.com/fashion/fashion-blog/2014/feb/12/jewellerys-value-emotional-sentimental-worth

⁶² 'War Medals Taken in Aberdeen House Break-In' *BBC* (23 June 2017) at www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-40381090

sentimentally valued property,⁶³ a profound sense of grief is also felt when such property is lost or acquired by another.⁶⁴

On the death of an individual, emotional harm felt at the loss of property associated with the deceased is conflated with the emotion of grief arising from the death and loss of the person themselves. Some will have a stronger attachment to property as of right, based on their ties to the deceased, as well as their own emotional and/or monetary investment in the deceased's property, and possibly also a shared history of generational investment in the same. Emotions may therefore play a pivotal role in decisions concerning how, and to whom, such property is to be distributed when will-making.⁶⁵ These psychological and emotional dynamics render wills highly emotive documents.⁶⁶

1.2 Will-Making and Sentimental Attachments

Wills permit testators to make specific bequests that are tailored and unique to an individual or family's circumstances. These tell us most about sentimental attachments to property transferring on death, and the importance to testators and families that treasured items pass to those who also attach sentimental value to the same.

⁶³ J Twigg, *The Body in Health and Social Care* (Macmillan 2006) 125

⁶⁴ K Erikson, *Everything in its Path* (n 11) 115; Svašek (n 11) 77

⁶⁵ Conway and Stannard, *The Emotional Dynamics* (n 21) 37

⁶⁶ *ibid*, 37 and 44

1.2.1 *The meaning of bequests*

Bequests in wills are often emotionally charged with meaning and the property transferred imbued with sentimental attachments. Research undertaken by Finch et al revealed, from a sample of eight-hundred wills across four probate years, that:

‘4 per cent...named specific household items, 2 per cent bequeathed clothing, 8 per cent jewellery, and 4 per cent included items [that the researchers]...categorised as being potentially valuable or possible family heirlooms. These included items of silverware, paintings, medals, and furniture ... described as antique or...a “family piece” in the will.’⁶⁷

Whilst this seems a low percentage, most items will transfer in any event to those who have a shared history and attachment to property, either under the will as part of the residuary estate, or by survivorship where property was already jointly owned. What is most telling as regards sentimentality in this research, however, was the discovery concerning the nomination of substitute beneficiaries.

Whilst in most cases it is essential to name substitute beneficiaries to prevent lapse, except now for gifts to a testator’s lineal descendants,⁶⁸ Finch et al’s research found that around three-quarters of those leaving gifts to non-family members failed

⁶⁷ J Finch and L Hayes, ‘Inheritance, death and the concept of the home’ (1994) 28(2) *Sociology* 417, fn 6

⁶⁸ Wills Act 1837 (WA 1837), s 33 (introduced by the Administration of Justice Act 1982, s 19)

to provide a substitute, whereas gifts to family members tended to provide for substitute beneficiaries within the same family.⁶⁹ It is agreed that this is indicative of two things. First, there is a desire to keep certain property with certain members of one's family and they are those of the deceased's choosing. Second, in other circumstances, with regard to gifts made to those outside the family, allowing lapse to occur indicates that 'if the beneficiary dies before the testator, the gift loses its meaning'.⁷⁰ The idea of providing a substitute beneficiary highlights that the property itself and its retention is important to the testator and presumably to those to whom the gift is given. The failure to name a substitute beneficiary suggests some gifts lose meaning on a beneficiary's predecease, evidencing that sentimental attachments to certain property comes only from a connection between the testator, that specific beneficiary, and perhaps from the gift itself.⁷¹ As Banks et al note 'the same object can carry with it different meanings for different people, and...can become more or less significant as our relationships to others change over time. This is true even through bereavement, where artifacts can take on new meaning as they shift to become objects of historical legacy'.⁷² Sentimentality is therefore both personal and transient.

⁶⁹ Finch et al (n 2) 145

⁷⁰ *ibid*, 149-150

⁷¹ See also W Odom et al, 'Passing On & Putting To Rest: Understanding Bereavement in the Context of Interactive Technologies' (Association for Computing Machinery's Conference on Human Factors in Computing Systems, Atlanta GA, 10-15 April 2010) 1831

⁷² R Banks, D Kirk and A Sellen, 'A Design Perspective on Three Technology Heirlooms' (2012) 27 *Human-Computer Interaction* 63, 65

Given that most testators provide for those whom the intestacy rules include in any event,⁷³ albeit with the flexibility to distribute an estate in differing proportions, one reason for making a will is to secure the transfer of certain items of property, particularly those of sentimental value, to those without whom the property will lose all meaning. If property was not imbued with sentimentality then gift giving on death would be less important.

The importance of will-making and of gift-giving on death has been highlighted most recently during the coronavirus pandemic, as the demand for wills increased significantly.⁷⁴ This may be explained by people having more time to focus on their financial affairs during lockdowns, or perhaps because of the increased awareness of one's mortality during such a global health crisis. Despite tight socialising restrictions there was still a need for people to have a say over the distribution of their estates, to write their last wishes, and to make specific gifts. So important was the ability of people to still be able to make a will during the pandemic that the UK government introduced The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 to overcome witnessing formalities,⁷⁵ by permitting the electronic witnessing of wills for the first time. Introduced on 28 September 2020 as a temporary two-year measure, it can apply retrospectively from 31 January 2020, and has now been extended until 31 January 2024.

⁷³ Finch et al (n 2)

⁷⁴ J Slingo, 'Will making on the rise in wake of coronavirus' *Law Gazette* (02 December 2020) at www.lawgazette.co.uk/news/will-making-on-the-rise-in-wake-of-coronavirus-/5106639.article

⁷⁵ WA 1837, s 9

Changes in the forms of property have also prompted increased scholarly and media interest⁷⁶ in the inheritance of chattels once tangible, but now intangible, and created and stored often only digitally. Harbinja and Edwards', and Conway and Grattan's respective work into the challenges surrounding digital inheritance highlights this as an area that particularly invokes sentimentality and a greater need for will-making to assist in the distribution of digital property.⁷⁷ Data storage companies such as cloud services, email, and social media require at least the deceased's authority, if not also court approval, to permit relatives access to a deceased's digital property, and even then they cannot guarantee access to devices.⁷⁸ Loss of access, particularly to photographs, it is argued, causes emotional harm.⁷⁹ These were items that once would have transferred tangibly in boxes or albums, and without great restriction. Legal professional bodies increasingly encourage their members to record testators' digital access information, highlighting the importance of such to administration of

⁷⁶ 'Father asks Apple head Tim Cook to unblock dead son's iPhone' *The Guardian* (31 March 2016) at www.theguardian.com/technology/2016/mar/31/father-apple-tim-cook-unblock-dead-son-iphone-leonardo-fabbretti; B Griffiths, 'Access Denied: Grieving parents blast Facebook's "cruel" social media rules for denying them access to their dead children's accounts' *The Sun* (22 June 2019) at www.thesun.co.uk/news/9354138/facebook-blocks-dead-childrens-accounts/

⁷⁷ See, for example, L Edwards and E Harbinja, "'What Happens to My Facebook Profile When I Die?": Legal Issues Around Transmission of Digital Assets on Death' in C Maciel and V Carvalho Pereira (eds), *Digital Legacy and Interaction: Post-Mortem Issues* (Springer International Publishing 2013); E Harbinja, 'Emails and death: Legal issues surrounding post-mortem transmission of emails' (2019) 43(7) *Death Studies* 435; and H Conway and S Grattan, 'The "New" New Property: Dealing with Digital Assets on Death' in H Conway and R Hickey (eds), *Modern Studies in Property Law: Volume 9* (1st edn, Hart Publishing 2017).

⁷⁸ Microsoft 365 Support, 'Accessing Outlook.com, OneDrive and other Microsoft services when someone has died' at <https://support.microsoft.com/en-us/office/accessing-outlook-com-onedrive-and-other-microsoft-services-when-someone-has-died-ebbd2860-917e-4b39-9913-212362da6b2f>;

Apple Support, 'How to request access to a deceased family member's Apple account' (April 2022) at <https://support.apple.com/en-gb/HT208510>; and Google Account Help, 'Submit a request regarding a deceased user's account' at <https://support.google.com/accounts/troubleshooter/6357590?hl=en>

⁷⁹ (n 76)

estates, but also the sentimental importance of a person's digital property.⁸⁰ The Law Society notes that '[d]igital assets with sentimental value can be the most difficult to sort out, but can be the most important for those left behind.'⁸¹ Photographs and messages will rarely be worth anything to anyone other than those connected to the deceased, but may be more valuable to them than monetary assets.

1.2.2 *A case of keeping it in the family*

Case law sheds light on will contents, highlighting the types of gifts testators make and to whom. In *Shelley* (1868) the testator left various items of jewellery to her nephew "to go and be held as heir-looms by him, and by his eldest son on his decease...and so on, to the eldest son of his descendants...".⁸² The court decided that a valid trust had been created in favour of the nephew's sons and so he was not free to leave them in his own estate to his wife, thus keeping the items in the testator's direct family line. *Shelley* was followed in *Re Steele's Will Trusts* [1948], which contained a similar trust of jewellery, specifically a diamond necklace, which the testator requested be held on trust for her son "as an heirloom" and to pass thereafter to his descendants.⁸³

⁸⁰ G Rycroft, 'Protecting your online assets' *The Law Society* (12 May 2016) at www.lawsociety.org.uk/topics/blogs/protecting-your-online-assets; and STEP, 'Digital Assets' *The Society of Trust and Estate Practitioners* at www.step.org/digital-assets

⁸¹ Rycroft (n 80)

⁸² *Shelley v Shelley* (1868) L.R. 6 Eq. 540, 540

⁸³ [1948] Ch 603, 603-604 (Wynn-Parry J)

It is possible that sentimentality and monetary worth played their part in the testators' motives, but both cases highlight a desire to keep certain items within the family. There is no indication though, in either case, that the jewellery had previously held any sentimental value before coming into the testators' possession, though both class their gifts as 'heirlooms'. Neither case, and indeed no case law, truly address what is meant by an "heirloom", though it is commonly understood to be a term synonymous with items of family heritage and importance. Odom et al noted that participants in their study regarded 'objects of historical legacy...as heirlooms in the classic sense and ownership had been retained within the family for many decades...These objects owed to the broader family line, rather than the life of the loved one that had recently bequeathed them.'⁸⁴ This suggests that heirlooms have broader and longer lasting sentimentality, spanning generations as opposed to just two individuals.

Whilst the cases considered highlight the sentimentality testators themselves attach to specific gifts in the way that they are gifted, and also in to whom they are gifted, the courts, often indirectly or as a subsidiary issue, have to navigate sentimentality in inheritance disputes. Often this is because the property's value is attached to a person or place and judges, as seen earlier in this chapter, have shown sympathy for those concerned in disputes over, sometimes quite literally, the family china.⁸⁵ Judges are faced with witness beneficiaries, the real people who hold

⁸⁴ W Odom et al (n 71) 1834

⁸⁵ *Butler* (n 9), and see below.

sentimental attachments to items of property in dispute and so their recognition of sentimentality and their empathy is unsurprising.

In the case of *Butler*, the court recognised the sentimental attachment that two beneficiaries held for their father's '502 items of 17th century Chinese porcelain'.⁸⁶ In dividing up the assets between four beneficiaries sentimentality was influential in the judge's decision to permit each beneficiary to choose in turn an item of their choice until all assets had depleted. The judge found 'that a 1-2-3-4 selection process would [not] produce an unjust result whether by reference to value or otherwise',⁸⁷ thereby allowing each beneficiary to choose at least some items holding the most sentimental value to them. Whilst the court recognised that selection may turn on sentimental as well as monetary value,⁸⁸ it was also dismissive of sentimentality in advising that where an uneven number of items fell to be distributed of equal monetary and sentimental value, the undistributed items would be ordered sold and the proceeds distributed equally.⁸⁹ This wholly ignores sentimentality and the emotional loss associated with such action, but would, as the court put it, 'break the deadlock'.⁹⁰ A principal concern for the court is always to resolve financial and family disputes practically and completely for the benefit of the parties concerned, litigation being the final resort and end to the matter. One way, and arguably the only way they can do this, without making orders that beneficiaries share property and thereby potentially

⁸⁶ *ibid* [1]-[2]

⁸⁷ *ibid* [98]

⁸⁸ *ibid* [76]

⁸⁹ *ibid* [72]-[73]

⁹⁰ *ibid* [72]

perpetuate disputes for years to come, is to resort to a financial resolution to try and achieve equitable fairness.

The courts have also recognised that once detached from a person or place an item can lose sentimental value, or at least significance. In *Re Bathurst* [2018], heard by the same judge as in *Butler*, HHJ Barker QC, the court acknowledged that the large landed estate at the centre of the case was historic.⁹¹ It was noted that the deceased Eighth Earl of Bathurst had tried to satisfy 'both his duty to his children and his desire to provide for Lady Bathurst', who was his second wife and stepmother to his heir.⁹² Among other matters, the case concerned the construction of a trust created by statutory codicil to protect chattels within the deceased's estate, and referred to as heirlooms,⁹³ from passing out of the family on his wife's death. She was a US citizen at the date of the codicil, as a result of which there would have been tax implications for the estate and a potential loss of important assets inextricably linked to the same. By amending the testator's will, the court upheld what it deemed to be the testator's wish to keep property within the family line, and in doing so it also kept any tax benefit within the UK. The case indirectly highlighted that property that is often inherited, particularly in aristocratic and landed families, carries historic significance, and arguably with it a broader sentimentality, the loss of which could be of concern to more people than just the family involved, potentially being relevant to a country's historic or cultural heritage.

⁹¹ *Bathurst* (n 37)

⁹² *ibid* [20] (Barker HHJ, QC)

⁹³ *ibid* [17]

Another issue in the case relevant to sentimental attachment to property was whether the deceased's widow would be 'required to part with the use and enjoyment of the chattels...which have an important non-monetary significance to her'.⁹⁴ The court acknowledged that although the chattels were 'less valuable in monetary terms...monetary value [was] not the only consideration'.⁹⁵ Whilst the court decided against the widow on the point of construction, it was found unlikely that she would have to give up property that she had enjoyed use of for the past 30 years, as for the heir to require her to do this would be capricious.⁹⁶ Furthermore, there was evidence of 'an understanding between the Eighth Earl and Lady Bathurst...that upon Lady Bathurst's death [certain chattels] would be kept in the Bathurst family'.⁹⁷ In other words, whilst she would likely continue to enjoy them in her lifetime, she had no legal right to do so and the terms of the settlement meant they would ultimately revert to the deceased's heir. Sentimentality was engrained throughout the court's considerations in its efforts to uphold what it deemed the deceased would have wanted; to keep the property within his family, but to preserve use in the wife's lifetime to property to which she was attached. This was not, however, a case about anyone parting with property on a permanent basis, which may explain the more prominent role of sentimental attachment in the judgment.

The courts have also recognised that a testator's sudden lack of demonstrable sentimentality can be indicative of a loss of testamentary capacity. In *Sharp* the

⁹⁴ *ibid* [32]

⁹⁵ *ibid* [44]

⁹⁶ *ibid* [101]

⁹⁷ *ibid* [10]

testator had made repeated gifts to his daughters of furniture and paintings in both an earlier will and several codicils, and 'he had specifically asked them to keep [these items] in the family.'⁹⁸ In his last will and testament, however, he had excluded his daughters completely. The court found that although the financial value of these specific gifts was not significant, they carried 'sentimental value' for his daughters.⁹⁹ This was influential in the court's finding that the testator lacked testamentary capacity to make his purported last will. The testator's sudden ignorance of sentimentality, as well as inconsistency with his earlier testamentary dispositions, demonstrated irrationality.

As these cases evidence, testators consider sentimental attachments to property, particularly in relation to those items that they consider to be "heirlooms", which although they may hold monetary value, are not intended to be sold, but to pass to future generations. A demonstrable lack of recognition of sentimental value, as in *Sharp*, can also raise questions as to testamentary capacity, particularly where no other reason could 'explain the decision' to ignore sentimental attachment.¹⁰⁰ No reason proffered in the case came 'anywhere near providing a rational explanation' for the testator's failure to pass sentimental property to his daughters.¹⁰¹ The courts cannot avoid considering sentimental value where items mean so much more to the parties involved than just financial worth. Sentimentality factors into the court's considerations and can be influential and persuasive in the conclusions reached.

⁹⁸ *Sharp* (n 9), [171] (Strauss QC)

⁹⁹ *ibid* [250]

¹⁰⁰ *ibid*

¹⁰¹ *ibid* [252]

1.2.3 *Negative emotions arising from sentimental attachments*

It has been noted that heirlooms, seen 'through the lens of the life of a deceased member of a family, or a friend' have 'rich connections with memory'.¹⁰² Bequests, however, may not always be well received. Beneficiaries may disclaim an inheritance.¹⁰³ Further, the sentimental attachment the testator had to the gifted property may not resonate the same with the beneficiary and could be a painful reminder of the past or of what has been lost.¹⁰⁴

Research has highlighted the negative impact of inheritance arising when one inherits something so associated with the deceased that it can never feel as if it is theirs or serve the testator's intended purpose.¹⁰⁵ This is not necessarily due to a dislike of the property inherited or of the deceased, but the opposite; it is often rooted in the love beneficiaries had for the deceased and their grief, the emotional toil and strain of reminders of the person lost. It is 'a key peculiarity of this relationship [of bequeathing]...that it is *asymmetric* - the bereaved are left to come to grips with the things passed to them, which leaves them, sometimes, to grapple with understanding why they were chosen to be the bearer of particular things.'¹⁰⁶ Inherited property can be too emotionally charged with sentimentality.

¹⁰² Banks et al (n 72) 64

¹⁰³ WA 1837, s 33A (1)(a); and AEA 1925, s 46A (1)(a)

¹⁰⁴ Finch and Hayes (n 67); and W Odom et al (n 71) 1834-1836

¹⁰⁵ *ibid*

¹⁰⁶ W Odom et al (n 71) 1834

The deceased may also have wished the beneficiary to use the property in a way in which the beneficiary is reluctant to do so. Finch and Hayes highlighted this in their research regarding the transfer of a family home.¹⁰⁷ One participant beneficiary did not want to live in the home she inherited from her father as he had intended. The participant's 'own views of what was appropriate were completely at odds with her father's expressed wishes, yet she found it difficult to ignore them with equanimity' and felt guilt 'at not complying with her father's wishes.'¹⁰⁸ This may be because beneficiaries do not have the same sentimentality to the property transferred, or perhaps have too much sentimental attachment to the same to consider it their own home. It may also be that the beneficiary has their own sentimental attachment to another property which competes and outweighs any sentimentality held for the inherited property.

Positive and negative emotions associated with sentimental attachments to property can therefore influence what a beneficiary would like to inherit from the deceased and how they perceive and treat their inheritance. Testators who make gifts in wills based on their own perceived understandings of others' sentimental attachments may be misguided. As Banks et al have highlighted, sentimental attachments are personal.¹⁰⁹ Testators may therefore hold a different sentimental attachment to property than their beneficiaries, or may perceive a beneficiary to hold a sentimental attachment that they do not, leaving beneficiaries, perhaps wracked

¹⁰⁷ Finch and Hayes (n 67)

¹⁰⁸ *ibid*, 425

¹⁰⁹ Banks et al (n 72)

with emotional guilt, to make a decision on what is to happen to property they have inherited and which holds negative sentimental attachments for them.

Conclusion

Sentimental attachments to property are real and can be established using the four criteria: length of ownership, subjective associations and involvement, objection to sale, and emotional harm. Sentimental attachments are recognised across socio-legal scholarship and by the judiciary, as well as more widely within society, as evidenced by the content of wills and media reports. Inherited property is particularly imbued with sentimentality and whilst the same may financially support family or dependants, will-making serves a whole other purpose; to transfer property of meaning to those to whom it means something to, regardless of whether it holds monetary value. The law, however, does not provide a “sentimental solution” to disputes over inherited property, leaving beneficiaries and their representatives to navigate the same at times of often great emotional upset. The emotional toil and costs associated with making a claim, and of defending one, means that most people will not pursue litigation. This does not mean, however, that family disputes go away. The death of a loved one can cause seismic shifts in family relationships years after they have died.

The courts are at least sensitive to sentimentality and recognise a right of inheritance for some to keep property they have inherited, protecting the same where possible in disposal and division cases, and finding solutions to try and reflect a fair

distribution of assets on death based on sentimental attachment. "Keeping it in the family" is something the courts have always worked towards to uphold family finances and peace of relations, including recognising property's attachment to people, but also to places and history. Practically the court's role is to ensure the expedient resolution of disputes and the administration of estates, and often the only way to achieve this is to see beyond emotion and sentimental attachment, and instead to apply monetary division as a remedy to any stalemate. In this way sentimental attachment, whilst recognised, can often be ignored, the law missing the "true" value of the property in dispute. It is therefore incumbent on testators to make sure that they specify to whom property of sentimental value is to pass, and to recognise also the idiosyncrasies of beneficiaries' wishes in regard to the same, so a smooth property transition can take place on death that reflects a fair distribution of monetary and sentimental value acceptable to all. Inheritance is inherently imbued with sentimentality, an immeasurable value unique to the property and to the individuals who form such attachments to the same.

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