INTRODUCTION

Thousands of years ago the Pharaohs of Ancient Egypt tried to take their valuables with them to the next world, and grave robbers and archaeologists have been digging up the loot ever since!

In short, it can't be done. People cannot take their material possessions with them when they die. The questions this raises are, in essence, twofold:
(1) Who gets the deceased's possessions, and
(2) What is the procedure for handing them over to their new owners?

This dissertation is about the solutions adopted by two European countries, England & Wales on the one hand, and Spain on the other, and whether England & Wales can learn anything from Spain.

Over the years, the author has come to the conclusion that the system in England & Wales can undoubtedly be improved by the following:

1. Checking the ID of the testator/trix prior to the signing of the Will, and
2. Having a compulsory system of registration and deposit of Wills.

More controversially, it is the author's considered opinion that the Spanish system is better than the English model in the following areas:

(1) Spain's default matrimonial property regime of community property over England's separate ownership of property.
(2) Having obligatory heirs over the Inheritance (Provision for Family and Dependants) Act 1975.
(3) Spain's inheritance taxes over the UK's inheritance taxes.

The following dissertation is an attempt to explain why.

THE MATRIMONIAL PROPERTY REGIMES

By matrimonial property regimes I mean how movable and immovable property is acquired and held by married couples.

The author's opinion is that behind the principal Spanish matrimonial property regime there is a significant element of estate planning, which, although on the face of it appears to be completely lacking in the English model, is still present in how assets are held in England & Wales, albeit to a more limited extent than in Spain.

England & Wales

The Married Women's Property Act 1882 is the basis for how married couples acquire and hold property in England & Wales. Each party's income is their own, and each spouse holds their own assets entirely separate from that of the other.

Clearly, there is no estate planning in the 1882 Act. However, the position is ameliorated by the fact that home ownership is commonplace. Around 70% of housing is owner-occupied[1], and many couples own the matrimonial home as beneficial joint tenants[2] where the *ius accrescendi* applies with the result that a surviving spouse automatically gets the deceased spouse's share of the property regardless of what the rules of intestacy or what the deceased's Will might provide.

Kevin and Susan Gray in their *Elements of Land* Law 4th Edition, Oxford University Press, 2005, page 1028, state that:

> "Not only does the right of survivorship override testamentary dispositions[3]; it often has the effect of rendering testamentary gifts quite unnecessary.

[1] (2002) 32 *Social Trends* 166

[2] JE Todd and LM Jones, *Matrimonial Property* (London 1972), p 80.

[3] Although correct as the general rule, in the case of *Re Woolough, Perkins v Borden* [2002] WTR 595 it was held (albeit in very special circumstances) that severance of a beneficial joint tenancy could take place by Will. A brother and sister had made Wills (not amounting to mutual Wills) that specified the property in question and dealt with it in a manner that inferred that a severance had taken place when the Wills were executed.

> As between husband and wife or other domestic partners, the operation of survivorship assumes its clearest modern function as a simple and cost effective estate planning device.
>
> In a country where the majority of the population still make no Will,[4] the *ius accrescendi* permits a co-owned [equitable] estate to vest automatically in the surviving member of a domestic partnership – an outcome desired, it seems, by most married couples.
>
> The rule of survivorship thus provides a speedy and inexpensive testamentary substitute designed to benefit a surviving partner …"

Kevin Gray gives as a footnote in the 2nd edition of *Elements of Land Law*, Butterworths, 1993, p 467

> "Speaking of joint tenancy, one American commentator has pointed out that 'the people want it … because in most instances they want the survivor to get all the property in the event of death. It is the poor man's Will; it is faster and, in "no tax" cases, it is cheaper. It works well in practice for people of modest means'[5]"

Without citing the source of the statistics, *Principles of Family Law* by Stephen Cretney, Judith Masson and Rebecca Bailey-Harris 7th Edition, Sweet & Maxwell, 2003, p 102 states that

> "… pensions and life assurance funds represented the most important component of the household sector's wealth – 38 per cent in 1998, compared with 25 per cent residential buildings net of loans and 15 per cent securities and shares."

Given that many occupational pensions automatically give a surviving spouse a pension in their own right[6], and life assurance by definition pays out (either to the estate or to

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4 Although the Law Commission's Report, *Distribution of Intestacy* (Law Com No 187, 1989) contained the results of a survey that found that 60% of people aged 60 or over had made a Will. Unfortunately, the same survey found that two thirds of the population as a whole had not made a Will, and "in *Wills, Inheritance, and Families* (1996) a study of 800 Wills of testators dying between 1959 and 1989 carried out by J Finch, J Mason, J Masson, L Wallis and L Hayes, they conclude that the incidence of adults who die leaving a Will which is admitted to probate has remained 'remarkably constant' (p 50) between those years, and put the figure at 30 per cent." *Textbook on Succession* by Andrew Borkowski, 2nd Edition, Oxford University Press, 2002, pages 3 & 4.

5 See YB Griffith, *Community Property in Joint Tenancy Form*, 14 Stanford L Rev 87 at 108 (1961-62). For criticism that survivorship is nevertheless somewhat inflexible as a quasi-testamentary device, see NW Hines, 51 Iowa L Rev 582 at 598.

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nominated beneficiaries) on death, with the money almost always likely to end up in the hands of close family members, there is an extremely important element of estate planning inevitably in favour of a surviving spouse (and either directly or indirectly in favour of the children) built into the system despite the supposedly separate property regime installed by the Married Women's Property Act 1882.

In conclusion, it often takes a really conscious effort on the part of an owner of movable and immovable property to stop a very important part of their assets from automatically going to a surviving spouse and children, even if the testamentary dispositions specifically give everything to, for example, a cats home, and nothing to a surviving spouse and children.

Spain

Article 1315 of the [Spanish] Civil Code[7] (Cc) provides that "The economic regime of a married couple is that established, if any, by the spouses in a prenuptial agreement, without there being any restriction on what that might be, except for any limitations stipulated in this Code."

Article 1316 goes on to say that "Where there is no prenuptial agreement, or if a prenuptial agreement is ineffective, the regime will be that of community property."

In short, the default matrimonial property regime is that of "community property". If a couple want something else, (for example, separate ownership of property), then they will have to consciously make that decision and have an appropriate agreement drawn up.

Having an agreement that property will be held as community property is a possibility for cohabiting couples who do not want to actually get married, but who might want to share

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Death in service lump sum payments are not normally automatically payable to a surviving spouse, although they can be nominated in favour of a surviving spouse. If no nomination is made (and provided that under the terms of the scheme it isn't automatically payable to, for example, a surviving spouse) the lump sum is payable to the deceased's estate.

[7] See also articles 7 and 12 of the Catalan Compilation, article 23.1 of the Aragonese Compilation, law 80 of the Balearic Compilation, article 112 of the Civil Law of Galicia of 24 May 1995, and article 93 the Civil Law of the Basque Country of 1 July 1992.

their resources, and this has been expressly so stated in the *Judgment of the [Spanish] Supreme Court of 18 May 1992* in which the court in effect held that unmarried couples do not automatically have "community property" as the regime under which they acquire and hold assets, although it was possible to have it if they expressly agreed to have it.

The [Spanish] Civil Code's default matrimonial property regime is called "sociedad de gananciales".

Guillermo Cabanellas and Eleanor Hoague in *Spanish/English Legal Dictionary*, Butterworths, 1991, give as their translation of "sociedad de gananciales" = "community which arises relative to community property".

It is considered by the author of this dissertation that the translation given by Dr Cabanellas and Mrs Hoague is unclear and that "sociedad de gananciales" could be better translated as "a matrimonial property regime where the spouses jointly invest labour and capital and share equally in the profits (or losses)".

The assets acquired by the spouses under this matrimonial property regime are in Spanish called "bienes gananciales", which can be translated as "community property".

Taking articles 1344 and 1345 of the [Spanish] Civil Code together, this matrimonial property regime starts when the parties marry (or, if there is another matrimonial property regime agreed at the start of a marriage such as separate ownership of assets, when the parties agree to have community property), and the gains (or income) or profits (or losses) obtained by either of the spouses, belong equally to both of them.

So if, for example, (i) the husband earns €30,000 pa working down the mine, and (ii) the herd of cattle the wife is looking after on the family farm grows from 22 to 30 head of cattle, then the husband is deemed to earn €15,000 and the wife is deemed to earn €15,000 per annum[8], and the husband is deemed to have acquired 4 head of cattle and the

[8] Although this is not what necessarily happens in the case of income tax. Since 1991 the default system is that of each person being taxed on their own income, ignoring completely what the other spouse may or may not be earning. However, it is possible to specifically opt in favour of being taxed as a family unit.

wife also 4 (regardless of whether the 22 head of cattle were private property[9] or community property).

Article 1346 Cc provides that certain assets belong entirely to one spouse or the other and are not community property. They are called "bienes privativos" or "private property". The main ones are:
"1 The assets and rights that they had before the community was set up", ie what the parties had before they married.

"2 The assets and rights they acquired for free", ie what a person inherits or is given to him or her as a lifetime gift is "private property".

From a succession point of view this is a crucial exemption from community property because (as will become more clear after reading the chapters headed "Obligatory Heirs" and "The Rules of Intestacy") it means that property belonging to a parent (almost always) goes to his or her children, with the latter acquiring it as private property (not community property despite the matrimonial property regime being that of community property), and does not (normally) go to a surviving spouse, but article 1347-2 Cc does provide that the "fruit, income or interest" generated by private property is community property.

"3 The assets and rights acquired with private property or in substitution of private property."

This is a form of tracing. If, for example, I buy 100 shares in an oil company with money that is private property, the 100 shares will also be private property, but under article 1347-2 the dividends are community property.

"6 Compensation paid for personal injury or damage to private property."

Law 18/1991 and Law 40/1998 Impuesto sobre la Renta de las Personas Físicas.

[9] Article 1347-2 of the [Spanish] Civil Code

"7 A person's clothes, and personal effects that are not extraordinarily valuable."

"8 A person's tools of the trade or profession, except where they are an integral part of, or belong to, an establishment or business run together [with the other spouse]."

The last paragraph of article 1346 provides in effect that the tools of the trade or profession bought with community property remain private property, but that the community is a creditor for the money used.

For example, a plumber who buys a monkey wrench for €75.00 with the said €75.00 being community property, owns the monkey wrench as private property, but owes the community €75.00.

A number of articles detail what is community property.

Article 1347. Community assets are:
"1. Those obtained by the work or industry of either spouse."

This refers to a spouse's wages, salary or profit share. The earned income of both spouses is added together and divided by two.

"2. The fruits, rents or interest that both private property and community assets produce."

"3. The assets acquired for valuable consideration at the expense of the common income, regardless of whether the acquisition was for the community or for only one of the spouses."

For example, if the husband buys a car for his own personal use (to the exclusion of his wife who may have a car for her own personal use) from income that is community property then the car that he has bought is co-owned in equal shares with his wife.

"4. Those [assets] that are acquired by a right to buy once a sale to another party has been agreed and that are community property, even when purchased with private money, in which case the community owes the spouse [who paid for it out of his or her own private money] the amount paid."

"5. The enterprises and firms established whilst the community is in existence by either of the spouses at the expense of community assets. If in the establishment of the enterprise or firm there is private capital and community capital, article 1354 applies."

Article 1354 provides that "Those assets that are acquired by money or work that in part is community property and in part private property, they are both community property and private property in the proportions that each contributed to their acquisition."

There is much more on what is and what is not community property, for example, article 1351. "Gaming wins made by a husband or a wife … are community property."[10], but most of it is of a kind that would make a reader's eyes glaze over, and reciting it all here would not aid anyone's understanding of the material.

The key to why Spanish couples might not want to be married under a regime of community property, but to have a matrimonial assets regime similar to that of English & Welsh couples is, in part, to be found in article 1365 which states that "Community property can be taken by creditors for debts run up by one spouse:

1. When he or she uses their "domestic power" (eg goes shopping or takes on a plumber to install a boiler) or lawfully administers or disposes of community property.

2. When he or she works in the usual manner as a professional person or tradesman or in the ordinary administration of their own [private] property.

[10] Although, interestingly, article 1372 of the [Spanish] Civil Code provides that gaming losses that can be enforced against the debtor (ie the gambler) can only be enforced against their private property.

If the husband or wife are commercial persons (eg shopkeepers), one applies the [Spanish] Commercial Code."[11]

In short, if either spouse is likely to go into business on their own account and the business is a risky one, then separate ownership of property on the English model is preferable to having community property.

Another major reason why Spaniards might specifically opt to have separate ownership of property is in article 1347-2 of the Civil Code which provides that the fruit, rents or interest that both private property and community property produce are community property.

For the seriously wealthy, (or for those who consider themselves to be seriously wealthy), having a relatively poor spouse acquire a half share in the dividends produced by shares that are private property, or a half share in the rental income of a block of flats that is private property, or the interest on privately owned money held on deposit in a bank, can be too much to bear, even when they are supposedly very much in love and not having the slightest inkling that there might be a separation or even a divorce later on.

The vast majority of Spaniards are married with their matrimonial property regime being the default regime of community property.

Spaniards regard marrying with separate ownership of property as being somehow "unworthy" or "insulting" or "not the done thing". Maybe with divorce becoming extremely commonplace this attitude will change.

There is no Spanish equivalent to England's Inheritance (Provision for Family and Dependants) Act 1975 and the fact that the vast majority of Spaniards are married under a

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[11] The Commercial Code specifically excludes from being available to creditors of commercial persons in article 909-1 a dowry received by a husband and in 909-2 an inheritance or gift received by a wife. The Commercial Code is from 1885, and maybe it could do with being updated a bit, but the general drift is that whilst private property that belongs to the wife is untouchable in the event of a husband having to cease trading due to insolvency, community property is available to creditors.

matrimonial property regime that automatically shares the post marriage ceremony acquired assets equally between the spouses must have much to do with that.

Although joint tenancies and the *ius accrescendi* do not exist in Spanish law, (and therefore a surviving spouse does not automatically acquire a deceased co-owner's half share of community property), to a large extent, being married under Spain's default matrimonial regime means that reasonable financial provision will have already been made for a surviving spouse.

Under the default matrimonial property regime, after a long (and successful) marriage, a surviving spouse is likely to own half of the following:
1. the matrimonial home,
2. any other immovable properties bought with community property,
3. shares, gilts, and debentures bought with community property, and
4. cash at the bank.

In addition, the surviving spouse is likely to have inherited from his or her parents something, and the rules on obligatory heirs also provide him or her with a life interest on a substantial proportion of the deceased spouse's net estate[12], and there is a right to buy assets co-owned with other heirs[13] in that if a co-owner/heir sells their share to a third party, the co-owning spouse can demand that it be sold to them for the price agreed with the third party.

The fact that unmarried couples do not automatically have community property (and an unmarried "partner" is not an obligatory heir) may mean that sooner or later something similar to the Inheritance (Provision for Family and Dependants) Act of 1975 will need to be enacted in Spain if there isn't to be a substantial number of unmarried "widows" or "widowers" deliberately "disinherited" by the person they were cohabiting with or inadvertently "disinherited" by the rigid application of the rules of intestacy.

[12] Supra Chapter on Obligatory Heirs
[13] Articles 1067 and 1522 of the [Spanish] Civil Code

Spanish private pension schemes also provide for surviving spouses to receive a pension.

Although there is no *ius accrescendi* in Spanish law, under the default matrimonial property regime a surviving spouse is normally going to own half of any immovable property bought during the currency of their marriage.

Conclusion

Both countries make provision for surviving spouses in the way couples hold assets despite having radically different matrimonial property regimes.

The author prefers the Spanish default system of "community property" because it seems fairer that where spouses (in their own respective ways) invest labour and capital in a venture such as living together as a couple that they should also share equally in the profits, and it does automatically help towards providing for surviving spouses.

OBLIGATORY HEIRS

Spain has a system of obligatory heirs, also referred to as "forced heirs".

In England & Wales, on the other hand, testators/trices can give all their property to who they wish, albeit subject to the need to make reasonable financial provision for the persons listed in section 1 of the Inheritance (Provision for Family and Dependants) Act 1975 as amended, which includes a surviving spouse and children.

This raises the question of which system makes better provision for the surviving spouse and children.

Spain

Spain is not a unitary state when it comes to this area of the law[14]. Whilst most of Spain applies the [Spanish] Civil Code of 1889 as amended, there are some regions that have their own succession laws.

The regions with different laws to the rest of Spain regarding obligatory heirs are Navarre,[15] the Balearic Islands,[16] Cataluña,[17] the Basque Country,[18] and Aragón.[19]

With the exception of the province of Alava in the Basque Country[20], (which does have complete testamentary freedom), the general drift of all these different laws is to provide

[14] See Appendix A, which is a photocopy map of Spain showing all the Autonomous Communities.

[15] Laws 149, and 267 to 271 inclusive of Law 1/1973, of 1 March. Compilation of Navarre Civil Law.

[16] Legislative Decree 79/1990, of 6 September, more expressively called the Revised text of the Compilation of the Civil Law of the Balearic Islands, articles 41 to 50 inclusive, 65, and 79 to 84 inclusive.

[17] Law 40/1991, of 30 December, also known as the Code of Succession due to Death in the Civil Law of Catalonia, article 350 onwards.

[18] Law 3/1992, of 1 July, commonly called the Civil Law of the Basque Country, articles 53 to 66 inclusive.

[19] Aragon Civil Law, Law 1/1999, of 24 February, article 171 and onwards.

[20] Article 134 of Law 3/1992, of 1 July. "1. Those who have as their permanent residence the [province of Alava] can freely dispose of their assets by Will, …" The other provinces have obligatory heirs.

for the surviving spouse and children (per stirpes) on an obligatory basis, and it is the author's view that they are all "variations on a theme".

There is (as yet) no equivalent to the Inheritance (Provision for Family and Dependants) Act 1975 in Alava, but the principal matrimonial property regime of "community property" is the same in Alava as for the rest of Spain, so a surviving spouse will have already acquired half the family assets acquired by the couple from their earnings during their married life.

The Basque Country has three provinces. One of them is called Guipúzcoa. The province of Guipúzcoa is very mountainous and in the mountains there are solitary farmhouses dotted about. There are special rules governing these solitary farmhouses (and the land around them) that allow them to be left indivisibly to one or more of the obligatory heirs, with a view to them, in effect, not being broken up into ever smaller units that would end up becoming completely uneconomic to work.[21]

Galicia has its own Civil Code in Law 4/1995, of 24 May, but in article 146-2 it provides that the obligatory heirs are the same as those stipulated in the [Spanish] Civil Code.

The [Spanish] Civil Code

Article 807. "The obligatory heirs are:

1. The children and remoter issue vis-à-vis their parents and remoter ancestors[22].
2. If there aren't any of the above, then the parents and ancestors vis-à-vis their children and remoter descendants[23].
3. The widower and widow in the manner and in the measure stipulated in this Code."

[21] See article 153 of Law 3/1992, of 1 July, onwards.

[22] "Remoter ancestors" means in a straight line up, ie in effect grandparents, because a more closely related person excludes those more distantly related and there is no "per stirpes" upwards in the way that there is an inheriting per stirpes for issue of the deceased. Articles 915 – 942 inclusive of the [Spanish] Civil Code.

[23] "Descendants" means grandchildren or great-grandchildren or even more remoter issue, if appropriate, because the legitime (ie the part of the deceased's estate that must be given to the obligatory heirs) is divided up amongst the children of the deceased "per stirpes", with children of predeceased heirs taking equally the share their parent would have taken had he or she survived the person leaving the property in question. Articles 915-942 inclusive of the [Spanish] Civil Code.

Article 807 has to be read in the light of articles 930 to 942 inclusive which deal with the order of succession downwards (ie to children and remoter issue) and upwards (ie to parents, grandparents and great-grandparents) in detail.

If a deceased person has children they are all obligatory heirs per stirpes; ie if a child predeceases the testator/trix leaving children of their own, then the children of the predeceased child become obligatory heirs of the portion that their deceased parent would have taken had the predeceased parent survived the testator/trix. That is what article 807-1 means when read in conjunction with articles 930 to 934 inclusive.

If a deceased person never had any children, or if the deceased's children died before the deceased without leaving any surviving issue of their own, then the Spanish Civil Code provides that the deceased's parents become the obligatory heirs of the deceased[24].

However, parents, grandparents and great-grandparents only become obligatory heirs of non-troncal assets. Troncal assets are movable and immovable assets a person receives for free from a parent or remoter ancestor, or from a sibling[25].

Article 811. "The ancestor who inherits from the descendant assets that the latter had acquired for free from another ancestor, or from a sibling, is obliged to keep the assets thus acquired for relatives who are within the third degree[26] [to the deceased] and who belong to the line from which the assets came."

For example, if a mother provides her child with a house for free and the mother then dies, and then the child dies without issue and surviving parents. If the paternal grandparents acquire the house due to the rules of, for example, intestacy, then they hold the house for those relatives up to within the third degree (ie aunts and uncles in the

[24] Article 807-2 in conjunction with articles 935 to 942 inclusive.

[25] Article 811.

[26] Article 915 "… each generation is one degree". Article 918 "… a child is one degree from the parent, two from the grandparent and three from the great-grandparent. … a brother is two degrees from a brother, three [degrees] from an uncle, … four [degrees] from a first cousin, and so on."

collateral line and great grandparents in a straight line upwards) on the mother's side of the family who survive the deceased and who are the most closely related to the deceased, with all those of the same degree of relationship acquiring the house in equal shares.

Article 812. "Ancestors who give assets to their children where the latter then die without issue, inherit those same assets without anybody else inheriting them provided those same assets still exist as part of the estate. If they have been alienated, they succeed in all the actions that the donor had in relation to them, and in the price if they were sold, or in the assets that have replaced them if they were exchanged for any."

For example, if the deceased was given a house by the maternal grandparents, then the house has to go back to the maternal grandparents.

If the house that was given was sold for €250,000, the maternal grandparents have a right to get the €250,000 sale price.

Under articles 811 and 812 if a deceased has no children or remoter issue, troncal assets have to go back to the person who gave them, and if that person is no longer alive the assets have to go to the relatives most closely related to the deceased (up to and including aunts and uncles) who are from the same side of the family as the person who donated the asset to the deceased.

What articles 811 and 812 in effect recognise is that if assets come from one side of the family, where reasonably possible, they should remain in that side of the family if there is no issue of the deceased who can inherit.

This is an important cultural decision taken by Spanish society and is fundamental to the debate on whether there should be obligatory heirs or not.

Why should people who have been given substantial assets either inter vivos or mortis causa then be able to give those same assets away to absolutely anybody by Will?

If, for example, a child was given a house by a parent in order to have a place in which to live, why should that child later be able to give it to a donkey sanctuary?

Why should donors and their closest relatives see assets from their side of the family go to the other side of the family on a rigid application of the rules of intestacy?

If one parent is already dead, then the sole surviving parent becomes the sole obligatory heir[27] of the non-troncal assets.

The troncal assets only follow the rules of obligatory heirs under article 807-2 if there is no-one to inherit them under articles 811 and 812, ie there is no parent, grandparent, great-grandparent, sibling, nephew or niece, or aunt or uncle, (but not first cousins or more distant relatives) from the side of the family the assets came from in the first place.

If, for example, the deceased had no surviving issue or parents, but there are surviving maternal and paternal grandparents, the legitime (ie the part of the estate that must be given to the obligatory heirs, which normally will not include troncal assets) is divided up into two equal parts, with the maternal grandparents sharing one half equally between them, and the paternal grandparents sharing equally the other half.

If there is, for example, only one maternal grandparent, that maternal grandparent gets the whole of the half share that belongs to that line. The same applies if there is just one paternal grandparent[28].

If the deceased had no surviving issue or parents, but had a surviving maternal grandparent and a surviving paternal great-grandparent, the surviving maternal grandparent gets the whole of the legitime. It is not divided up between the two lines, but rather it is given entirely to the closest surviving relative.[29]

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[27] Article 810 of the [Spanish] Civil Code.

[28] Article 810 Cc

[29]

Article 808. "The legitime of the children and remoter issue is two thirds of the estate of the father or the mother.

However, the latter can give one part of the two thirds of the legitime as an improvement to their children or remoter issue.

The remaining one third can be freely disposed of."

Reading article 808 in conjunction with articles 823 to 833 inclusive and in conjunction with articles 930 to 942 inclusive, what the above means is that if the net estate is worth €300,000.00, €200,000.00 is the legitime and €100,000.00 can be given away by the testator/trix by his/her Will to whomsoever he/she wishes.

The €200,000.00 legitime can in its turn be subdivided into two equal parts. €100,000.00 has to be divided equally between all the children (or remoter issue per stirpes, if one or more children predeceased the testator/trix leaving surviving children), whilst the remaining €100,000 of the legitime can be given to one or more of the children (or remoter issue per stirpes, if appropriate) as the testator/trix sees fit in order to "improve their lot".

Article 809. "The legitime of the parents or remoter ancestors is half the estate of the children and remoter issue, except if there is at the same time a surviving spouse, in which case [the legitime] is one third of the estate."

Article 810. "The legitime of the parents is to be divided into two equal parts: if one has already died, the survivor gets all of it.

If the testator does not have a surviving father or mother, but there are surviving remoter ancestors, of the same rank, both paternal and maternal, the estate will be divided equally

Article 810 Cc

between the two lines. If the ancestors are of differing degrees of relationship [to the testator/trix], the estate goes entirely to those most closely related [to the deceased]."

If the only reason for having obligatory heirs was to make sure that the surviving spouse and children are properly provided for, then presumably the parents and remoter ancestors do not actually need to be included in the list of people who must inherit.

So the Spaniards who drafted the Civil Code must have thought that it was only fair that parents and remoter ancestors inherit assets that were not going to be passed on to issue of the deceased, and that is almost certainly what most people think today in Spain.

On the other hand, the Spanish Civil Code dates from a time when there wasn't any meaningful pension provision for the masses, and maybe it was thought that if the children did not need providing for because there aren't any, then providing for the parents and remoter ancestors becomes the overriding priority.

It appears to the author that Spanish society has tried to combine fairness with a concern for providing for close family members who might most require financial help.

Article 813. "The testator cannot deprive the [obligatory] heirs of the legitime except in the instances expressly stipulated by law.

It is also not permitted to put an incumbrance, condition, or substitution of any kind on the legitime, except for that stipulated in respect of the surviving spouse's life interest."

Article 814. "The passing over of an obligatory heir does not adversely affect the legitime. …" ie disinheriting an obligatory heir does not reduce the legitime. All that happens is that if, for example, there are two children and the legitime is €200,000.00, if one of the children is lawfully disinherited, the other one gets the entire €200,000.00.

This is presumably to avoid the temptation of the more unscrupulous to get round the laws on obligatory heirs by looking for an excuse to disinherit obligatory heirs with a view to favouring someone who would otherwise not get all that much.

The obvious example is the domineering, grasping[30] second spouse who would like to get their hands on as much of a deceased's estate as the law allows to the exclusion of the deceased's issue from a first marriage.

Article 815. "The obligatory heir who the testator/trix has left by whatever title less than the [amount of] legitime due, can seek to have it topped up."

Article 816. "Any renouncing to, or compromise of, the right to receive the legitime between the person who owes it and their obligatory heirs is null and void, and the latter can claim it when the former dies; but they must take into account whatever they might have received for the [illegal] renouncing to, or compromise of, their right to the legitime."

Article 823. "The father or the mother can give as "an improvement" to one or more of their children or remoter issue, either biological or by adoption, one of the two thirds of the estate that is the legitime."

Article 834. "The surviving spouse, provided the couple were not separated, or at least not due to the fault of the deceased, if there are also surviving children or remoter issue, has the right to an usufruct[31] on the one third[32] that is earmarked to be "an improvement"."

[30] Not only second spouses can (sometimes) be "grasping", but regrettably other people and organisations as well. Having obligatory heirs means that everybody who is "grasping" will find their "ambitions" kept more under control than if all the assets can be given by a testator/trix to whomsoever they wish.

[31] According to the *Concise Oxford Dictionary*, 7th edition, Oxford University Press, 1982 "Usufruct" is the "right of enjoying the use and advantages of another's property short of destruction or waste in its substance." In the opinion of the author this is merely another way of saying that the surviving spouse has a life interest in the one third destined potentially to improve the lot of a disadvantaged child.

[32] However, see article 837 that increases the one third to one half when the only obligatory heirs are children (but absolutely nothing else) conceived with the deceased spouse whilst their marriage existed.

This is something that the author feels needs looking at more closely. "An improvement" is intended to help a disadvantaged child. ie a disadvantaged child will share equally with the siblings the one third of the deceased's estate that has to be shared out when the testator dies, but can be given up to the entire one third that is the "improvement".

For example, if the net estate is worth €300,000.00 and there are two children, one of whom was left brain damaged after a road traffic accident, each child must receive €50,000.00 (ie €100,000.00 divided by two), and the brain damaged child can receive a further €100,000.00.

However, under article 834 the surviving spouse has a life interest on the €100,000.00, with the brain damaged child getting the capital once the life interest ends.

If the child is disadvantaged, and therefore presumably really needs the extra money, why does the Spanish Civil Code only give that disadvantaged child the money when the surviving spouse finally dies?

How much help will a brain damaged adult get from an unscrupulous step-parent? Sadly, just to pose the question in those terms gives one the answer.

Spanish law has rules that oblige parents to administer the property of their children[33], and it has rules for the administration of property belonging to children not under the "control" of their parents[34], but it does not have "accumulation and maintenance trusts" for children.

The essential differences between the Spanish rules for administering property belonging to minors and the English "accumulation and maintenance trust" is that in Spain
(i) a judge needs to approve all major dealings in property belonging to the minor[35] and,

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[33] Articles 164 – 168 inclusive of the [Spanish] Civil Code.

[34] Articles 215 – 285 inclusive of the [Spanish] Civil Code.

[35] For example, article 166 of the [Spanish] Civil Code.

(ii) except where the parents are clearly unable to administer the property of their children, it is always the parents who administer the property of their children[36].

The need for, in effect, a court order to approve all dispositions relating to land and valuable movable property is expensive and slow compared to the English system of the trustees holding and managing property for the benefit of the beneficiaries.

In the author's view, to have always only the parents involved in administering the property of their children compares unfavourably with the English system whereby the settlor or testator/trix decides who is to hold and manage the property of the minor.

In the Spanish system parents who are not suitable for administering the property of their children need to be specifically "removed" from their position by a court order.[37]

It appears to the author that in the absence of a law of trusts on the English model Spanish society has had to assume (and hope) that a surviving spouse will hold and manage property not only for the benefit of the surviving spouse, but also for the disadvantaged child.

Without there being a wholly unrealistic massive incorporation of the English law of trusts into the Spanish legal system, the solution adopted by Spain of giving the surviving spouse a life interest on the one third destined for improving the lot of disadvantaged children of the deceased is probably the best that can be done in the circumstances.

In today's society it seems to me to be essential to expand the term "surviving spouse" to include "surviving long-term partner" if "need" is one reason for the existence of obligatory heirs.

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[36] Article 164 of the [Spanish] Civil Code.

[37] Article 170 of the [Spanish] Civil Code.

Furthermore, some thought has to go into deciding who is the real priority: the children or the surviving spouse/partner?

If the surviving spouse is a mother with young children she'll need the money. If the surviving spouse is an elderly widow, she'll also probably need the money.

The only group of widow/widower who, on the whole, probably does not really need the money is the late middle aged whose children have left the family home to set up their own homes with their own spouse and children.

Obviously, the above is a gross simplification and generalisation, but the whole of this area of the law is about generalisations.

Short of drafting some astonishingly complex laws, the best that can reasonably be done is make a general observation and draft some relatively simple laws for the general rule, whilst at the same time ignoring the exceptions to the rule.

In the author's view, the flexibility given to testators/trices in the English system can be extremely valuable in dealing with the exceptions to the rule, but do people in England & Wales really take advantage of that flexibility, and, when people in England & Wales make Wills do they do so in a responsible manner, regularly updating their Wills to take account of changing circumstances thereby providing for those who really need the money?

The evidence for people in England & Wales making Wills in a manner that provides best for those who most need the money is less than encouraging.

A huge number of adults in England and Wales do not have a Will at all[38], (thereby not making use of the flexibility afforded to testators/trices under English law to best provide

[38] *Textbook on Succession*, Andrew Borkowski, Oxford University Press, 2002, page 3 cites the Law Commission's Report, *Distribution on Intestacy* (Law Com No 187, 1989) when it says "It found that two in three adults had not made a Will." On page 4 Mr Borkowski cites a study entitled *Wills, Inheritance, and Families* (1996) carried out by J Finch, J Mason, J Masson, L Wallis and L Hayes, that found that the incidence of adults who die leaving a Will that is admitted to probate is around 30 per cent.

for family members who might really need the money in the circumstances), and some of those who do make a Will appear not to make reasonable financial provision for dependants[39].

The rules of intestacy can no more provide for the different circumstances a family finds itself in over time than can rules stipulating who must inherit and how much an obligatory heir must inherit.

Failing to make reasonable financial provision for dependants in a Will is often an abuse of the flexibility given to testators/trices under English law.

Article 837. "If there are no descendants, but there are ancestors, the surviving spouse has the right to a life interest over one half of the estate[40].

The same life interest is given if, when there is a surviving spouse, the only obligatory heirs are children conceived with the [deceased] spouse during their marriage. The life interest in such cases falls on the one third that can be used as an "improvement", and for the rest falls on the one third that can be freely given away."

It should be noted that article 837 specifically states "children", not "children and descendants" as in article 807. It is the author's view that this means that article 837 is not "per stirpes". Is this a mistake or was it intentional on the part of the legislators?

Why does the surviving spouse's life interest increase from one third to one half when there are children of the deceased conceived during the marriage with the surviving

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[39] *Textbook on Succession*, Andrew Borkowski, Oxford University Press, 2002, page 258 "In the 1920s there was considerable pressure for reform of the law to enable maintenance to be sought from a testator's estate. The precedent was cited of the Testators Family Maintenance Act 1900 (New Zealand), which enabled a testator's spouse and children to apply for provision on the ground that the Will did not provide for the 'proper maintenance' of the applicant."

In addition, many of the cases cited in *Inheritance Act Claims: Law and Practice*, Sidney Ross, Sweet & Maxwell, 2006 bear eloquent testimony to the fact that some people do not use responsibly the flexibility given to them by English law.

[40] However, the estate now excludes troncal assets. See articles 811 and 812 of the Spanish Civil Code.

spouse, but remains at one-third if the obligatory heirs include grandchildren (or remoter issue) of a predeceased child?

Presumably it was thought that if there are children of the marriage, (and no grandchildren or remoter issue as obligatory heirs), then the surviving spouse is likely to need more than if there were grandchildren or remoter issue as obligatory heirs.

The existence of grandchildren or remoter issue as obligatory heirs would normally indicate that the children of the deceased are adults and have children of their own that need looking after, and in addition to the surviving spouse not needing as much, the adult children of the deceased need the money in order to look after their families.

It is the author's view, therefore, that article 837 is correctly drafted.

Article 838. "If there are no descendants or ancestors, the surviving spouse has a life interest on two thirds of the deceased's estate[41]."

Article 834. "The heirs can satisfy the surviving spouse's part of the usufruct by giving him or her an income for life, what particular assets produce, or a capital sum in money, acting in agreement with each other, or, failing that, by court order.

For so long as the above is not done, all the assets of the deceased are charged with the payment of the usufruct to the surviving spouse."

Article 848. "Disinheriting [an obligatory heir] can only take place for one or more of the reasons expressly stipulated by law."

Article 849. "The disinheriting can only be done by Will, stating in it the legal reason for doing so."

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41 Excluding troncal assets if there are relatives of the deceased up to, but no more distantly related than, aunts and uncles from the line the assets originally came from. Articles 811 & 812 Cc.

Article 852. "Acceptable reasons for disinheriting [an obligatory heir] are those provided for in articles 853, 854 and 855, and those that give rise to being barred from inheriting provided for in article 756 [paragraph] numbers 1, 2, 3, 5 and 6."

Article 756. "Barred from inheriting are:
1. Parents who abandon, prostitute or corrupt their children.

2. Those who are found to be guilty in court of having murdered or attempting to murder the testator/trix, [or the testator's/trix's] spouse, issue or ancestors.

If the offender is an obligatory heir, they will lose their right to the legitime.

3. Those who have accused the testator/trix of having committed a crime punishable by a term of imprisonment of not less than six years and a day[42] and the accusation is found to have been false.

5. Those who with threats, fraud or violence oblige the testator/trix to make a Will or change it.

6. Those who with the same means stop someone from making a Will or revoke one already made, or who substitute, hide or change a later one."

Article 853. "Also sufficient [legal] reason for disinheriting one's children or remoter issue in addition to those specified in article 756 paragraph numbers 2, 3, 5 and 6 are the following:
1. Having not given without legitimate cause legally required maintenance to the parent or ancestor who is doing the disinheriting.

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The term used in article 756-3 of the [Spanish] Civil Code is "presidio o prisión mayor". This term is no longer used in the Spanish Penal Code. A new Penal Code came into force in 1996. The old Penal Code had it as a term of imprisonment of anything between six years and one day to twelve years. The Civil Code could do with being brought up to date by, for example, specifically saying "a term of imprisonment of no less than six years".

2. Having physically mistreated that person or seriously insulted that person."

Article 854. "Just cause for disinheriting parents and ancestors, as well as those causes indicated in article 756 paragraph numbers 1, 2, 3, 5 and 6, are the following:
1. Having lost the authority to look after one's children for one or more of the reasons stated in article 170.

2. Having not given without legitimate cause legally required maintenance to one's children or remoter issue.

3. One of the parents having murdered or attempted to murder the other parent without there being any [subsequent] reconciliation between them."

Article 170. "The father or the mother can be deprived either totally or partially of their right to look after their children by a court order, given in a criminal or a matrimonial case, based on their failure to carry out their duties as parents.

The courts can, in the interests of the child, order that the parents be allowed again to look after the child when the reason that gave rise to the order depriving them of being able to look after the child has ceased to exist."

Article 855. "Just cause for disinheriting one's spouse, as well as those specified in article 756 paragraphs 2, 3, 5 and 6, are the following:
1. Having seriously or repeatedly failed in carrying out their conjugal duties.

2. Those that give rise to the loss of the right to look after one's children under article 170.

3. Having failed in their legal duty to provide maintenance to their children or to the testator/trix in their capacity as spouse.

4. Having murdered or attempted to murder the testator/trix, provided there was no reconciliation between them afterwards."

Article 856. "Reconciliation afterwards of the offender and the victim means that the latter can no longer disinherit the former, and will leave without effect any disinheriting already done."

Article 857. "The children and remoter issue of a person who has been disinherited take that disinherited person's place in respect of the legitime and the rights of obligatory heirs."

In conclusion, it is very difficult to disinherit an obligatory heir. There has to be a reason permitted by law and that reason has to be stated in the Will. Furthermore, in appropriate cases a later reconciliation between the testator/trix and the person being disinherited will render the disinheritance invalid and reinstate the obligatory heir as an heir.

There is always a proportion of a person's estate for which there is testamentary freedom.

Article 808 provides that where there are children or remoter issue one third of a deceased's estate can be given away to whomsoever the testator/trix wishes.

Under Article 809 if the parents are the obligatory heirs (because there are no children or remoter issue of the deceased), and there is no surviving spouse, then half of a deceased's estate can be given away to whomsoever the testator/trix wishes.

It is the author's view that testamentary freedom does not mean that testators/trices can do absolutely anything they want with the money.

Article 1 "1. The sources of the Spanish legal system are the law, customs and the general principles of the law. …

3. A custom will only apply if there isn't any law that is applicable, [and] provided it is not immoral or contrary to public order and that it is proven [to exist]."

Article 7 "1. Rights can only be exercised in good faith.

2. The law does not condone an abuse of a right or the antisocial exercise of the same. All act or failure to act which by the intention of its author, by its objective or by the circumstances in which it is exercised clearly overstep the normal limits in the exercise of a right, causing a loss to a third party, will give rise to the [right to claim] the appropriate compensation and the courts or the administration [of the state] taking steps to stop the continuing of the abuse."

Therefore, whilst there is not quite the same level of detailed prescription as in English law, clearly repugnant gifts are unlikely to survive the scrutiny of the courts.

England and Wales

As a general rule a testator/trix can give their property by Will to whomsoever they wish, but there are a number of limitations to this freedom, and the questions are (1) what are those limitations, and (2) which is the better system: the Spanish or English one?

So how does English law limit testamentary freedom? There are a number of limitations, including that testamentary gifts that contravene the law will fail, thereby leading to the assets adversely affected either going to a substitutionary legatee specifically stipulated in the Will, or, if there is no substitutionary legatee stipulated in the Will, falling into residue, and, if it is the gift of residue that is adversely affected or the gift of residue fails for any reason, there is then an intestacy.

Examples of unlawful gifts given in textbooks, for example, *Hanbury & Martin Modern Equity*, Jill E Martin, 17th edition, Sweet & Maxwell, 2005, p 345 include (1) "*Thrupp v*

Collett,[43] where a testator attempted to provide for paying the fines of convicted poachers."

This is because paying the fines of those convicted of any offence (not just poaching) takes much of the sting out of the punishment, which thereby loses much of its deterrent effect and can, therefore, lead to an increase in criminality rather than its decrease.

(2) "Conditions [attached to gifts] designed to induce the separation or divorce of a husband and wife are void as being contrary to public policy."[44] This is because such conditions would undermine the institution of marriage.

However, it is permitted to make a gift to a surviving spouse conditional upon not remarrying[45]. Such a gift does not induce the separation or divorce of anyone, but it could be argued that it is a restraint on remarriage and should be interpreted as narrowly as possible.

(3) "Conditions operating as a complete restraint on the alienation of property are void as being contrary to public policy.

In *Re Brown*,[46] a testator devised [immovable property] among his four sons subject to a condition which would have produced forfeiture of his interest by any son who mortgaged or sold his interest other than among his brothers. The condition was held to be equivalent to a general restraint on alienation, and therefore void, since the class of permitted alienees was small and bound to get smaller."

There are other restrictions on testamentary freedom, some of which are highly technical, and the author is sure that as far as the courts are concerned the list is not closed.

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43 (1858) 26 Beav 125.

44 *Re Johnson's Will Trusts* [1967] Ch 387; *Re Caborn* [1943] Ch 224. See also *Re McBride* (1980) 107 DLR (3d) 233; *Re Hepplewhite Will Trusts, The Times*, January 21, 1977.

45 *Re Whiting's Settlement* [1905] 1 Ch 96; *Allen v Jackson* (1875) 1 Ch D 399

46 [1954] Ch 39.

The main restriction on testamentary freedom relevant to this dissertation is the Inheritance (Provision for Family and Dependants) Act 1975.

Textbook on Succession, Andrew Borkowski, 2nd edition, Oxford University Press, 2002, page 258 gives an historical perspective to the Inheritance (Provision for Family and Dependants) Act 1975 that is a valuable aid to understanding the current situation in England & Wales stating that "… testamentary freedom was severely limited for much of English legal history. … Throughout much of the medieval period land could not be disposed of by Will. … As for personalty … the basic position in early English law was that the spouse and children had a fixed entitlement in the deceased's estate. … It was only in the century or so after the Dower Act 1833 that testators were substantially unrestricted."

Summarising Mr Borkowski's historical introduction to the 1975 Act, the Inheritance (Family Provision) Act 1938 allowed spouses, unmarried daughters, sons under the age of 21 (ie the age of majority at that time) and children incapable of maintaining themselves by reason of disability could apply for reasonable financial provision on the ground that the Will did not make reasonable provision for maintenance of the applicant.

Since 1938 the scope of the Act has been continually widened.

"The 1938 Act was extended to intestacy by the Intestates' Estates Act 1952."

The Matrimonial Causes (Property and Maintenance) Act 1958 allowed former spouses who had not remarried to apply.

Section 1 of the Inheritance (Provision for Family and Dependants) Act 1975 currently allows:

(i) a spouse or former spouse (or civil partner or former civil partner[47]) of the deceased ("but not one who has formed a subsequent marriage or civil partnership"), or cohabitants[48] who were living as the spouse (or civil partner) of the deceased for two years before the deceased died, to apply for "reasonable financial provision", and

(ii) a child of the deceased, a child who the deceased treated as a child of the family and any person who the deceased wholly or in part maintained immediately before the death of the deceased can apply for "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance."

"Reasonable financial provision" for surviving spouses and former spouses is defined in section 1(2)(a) as being "such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance".

In addition to there being restrictions on testamentary freedom, the English equivalent to the Spanish bars on inheriting is the forfeiture rule[49], which prevents an offender from receiving anything from the victim's estate via a Will or the rules of intestacy or the *ius accrescendi* of a joint tenancy in equity.

Conclusion

So which system is the better of the two?

Starting on page 253 of *Textbook on Succession* Andrew Borkowski runs through some of the arguments for and against testamentary freedom.

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[47] The class of applicants was even further extended to include parties or former parties to registered civil partnerships by paragraph 15(2) of Schedule 4 of the Civil Partnerships Act 2004.

[48] Section 2(2) of the Law Reform (Succession) Act 1995 inserted a new subsection (1A) into section 1 of the 1975 Act which widened the class of potential applicants to include cohabitants.

[49] The topic of forfeiture is beyond the scope of this dissertation. The rules can be found in the Forfeiture Act 1870 and in such cases as *Re Sigsworth* [1935] Ch 89; *In the Estate of Crippen* [1911] P 108; and *Re K* [1985] Ch 85.

In synthesis the arguments Mr Borkowski gives in favour of testamentary freedom (without him necessarily supporting them) are:

1. "It is an essential incident of the ownership of property for a person to be able to dispose of his property on his death as he wishes – a natural continuation of an owner's freedom to deal with his property inter vivos." "It's mine, so I can do what I like [with it]".

2. Taking an argument from JS Mill's essay On Liberty, "the only purpose for which power can be rightfully exercised over persons against their will is to prevent harm to others".

As restricting any power is to prevent harm to others, and as "making a Will appears to confer benefits, not harm", it follows that testamentary freedom should not be restricted.

3. People feel pleasure when they give presents.

"It can therefore be argued that any restriction on testamentary freedom reduces the potential for pleasure in giving."

4. Being able to give our estate to whomsoever we wish gives us "security of mind"[50].

5. Being able to give our estate to whomsoever we wish "enables [us] to exercise a measure of control over family and friends.

The threat of being left out of the Will may help to bring rebellious family members to heel, and to persuade friends of the need to remain on good terms with [us]."

[50] Presumably Mr Borkowski means "peace of mind".

6. Testamentary freedom is consistent with rights over property in a free market economy.

7. Testamentary freedom is "an incentive to the accumulation of wealth".

"There would be less incentive [to accumulate wealth] if the testator/trix was restricted in [the testamentary] dispositions [that could be made]".

8. "If testamentary freedom was restricted so that family members had a clear expectation in a share of the [estate], they might work less hard as a result, thus reducing the total wealth of the country."

9. "No system of restricting testamentary freedom in order to protect the family is likely to do justice, because of the great variety in the potential circumstances affecting family members and other possible beneficiaries."

It is the author's considered view that this is probably the strongest argument in favour of testamentary freedom.

The sheer flexibility of the English model allows testators/trices to continually amend their Wills in order to adapt their testamentary dispositions to the changing personal circumstances of family and friends, and to provide for those who most need the assets.

The flexibility of the English model also allows testators/trices to keep businesses intact. To share assets amongst a number of beneficiaries can result in a business ceasing to exist.

Farms that are continually split up will sooner or later become uneconomic. Stately homes that are not passed on in accordance with tradition, but shared out equally amongst a number of children of the deceased, will soon cease to be stately homes.

With the following headings being a synthesis of the arguments against there being testamentary freedom given in *Textbook on Succession* by Andrew Borkowski, 2nd edition, Oxford University Press, 2002, commencing at page 254:

1." It is a defeatist argument to say that because no system of fixed entitlement is going to be perfect there should therefore be testamentary freedom."

People more often than not simply do not take advantage of the fact that they do have the freedom to give their estate to whomsoever they wish by making a Will[51], and the rules of intestacy apply just as inflexibly (and maybe inappropriately in the circumstances) as any rules on obligatory heirs.

2. "The making of a Will can clearly cause 'harm' in any natural sense.

Suppose, for example, that a testator has maintained his spouse and children during his life, but he leaves all his property (including the matrimonial home) to a charity. The effect of the Will may be to leave his family destitute and homeless – the harm caused to them is obvious."

It is the author's view that this is probably the strongest argument in favour of the Spanish system of fixed entitlements.

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Around two thirds of the adult population of the UK does not have a Will, and around only one third die having made a Will that it admitted to probate. *Textbook on Succession*, Andrew Borkowski, 2nd Edition, Oxford University Press, 2002, pages 3 & 4, where Mr Borkowski cites the Law Commission Report, *Distribution on Intestacy*, (Law Com No 187, 1989) and *Wills, Inheritance, and Families* (1996) a study carried out by J Finch, J Mason, J Masson, L Wallis, and L Hayes.

Human beings can be capricious and unfair. Whilst many people use their ability to give their assets to whomsoever they wish very responsibly, the fact that fairly soon after testamentary freedom became possible in England & Wales it was felt necessary to curtail it by (eventually) passing the Inheritance (Family Provision) Act 1938 would seem to indicate that a significant minority of testators/trices were not making Wills in a responsible manner.

In *Inheritance Act Claims: Law and Practice*, Sidney Ross, 1st Edition, Sweet & Maxwell, 2006, Appendix 4, page 327 onwards has summaries of cases brought under the Inheritance (Provision for Family and Dependants) Act 1975. The following two case summaries give a meaningful insight into the problems caused by each spouse having separate ownership of property plus testamentary freedom.

"[In] *Adams v Lewis* [2001] WTLR 493 the parties had been married for 54 years (with an 18 month separation followed by a reconciliation in 1961) and there had been twelve children of the marriage. Mr Adams died in 1991, one of his daughters having predeceased him.

By his Will he left £10,000 and his household goods and personal effects to his wife, and the residue of his estate to be divided equally between his surviving children and the children of his dead daughter. The trustees of his Will had power [not a direction] to apply any part of the residuary estate in providing and keeping up a suitable residence for Mrs Adams.

At the time of the hearing [Mrs Adams] was living in the house which had been bought as the matrimonial home in her husband's sole name and she expressed the wish to continue living there. Mrs Adams was 86 at the time of the hearing.

The judge was satisfied that Mrs Adams was a good wife to Mr Adams for over 50 years and a good mother to her children. …

Mrs Adams' financial position was that she had assets of just under £6,000 and her State pension which was £67.75 per week at the time of the hearing. She had supplemented her income by drawing some £2,000 from her savings over the previous six years.

The executor's account showed (in round figures) assets of £350,000 though the value of the freehold properties needed to be adjusted upwards, following a valuation by the court-appointed expert, by between £30,000 - £60,000.

There were liabilities of £103,000 including an IHT liability of £54,000 and legal fees to date were over £35,000. The parties' costs of the litigation were estimated at a further £52,000.

… the court awarded Mrs Adams an absolute interest in the matrimonial home (valued at £173,000), while reducing the pecuniary legacy to £5,000 which, together with interest from the expiry of the executor's year, would amount to about £8,000. She thus received approximately half of the net estate."

"[In] *Re Besterman, Besterman v Grusin* [1984] Ch 458 … the parties married in 1958. The testator died in 1976, aged 72, when the applicant was 60. By his Will dated July 29, 1973 he left a net estate of about £1.5M, of which Oxford University was the principal beneficiary.

[The testator] left [Mrs Besterman] his personal chattels and an income of £3,500 per year. She had a state pension of £400 per year and no other resources.

An interim order was made on July 21, 1980 and increased on July 31, 1981 so as to give [Mrs Besterman] aggregate capital of £259,000, amounting to one-sixth of the estate.

Held, in a case where there was a very large estate and the wife was wholly blameless and incapable of supporting herself, reasonable provision required that she should have a lump sum sufficient to relieve her of any anxiety for the future. The capital awarded by the judge at first instance was increased from £259,000 to £378,000."

Adams v Lewis highlights a major problem with all litigation and it is the cost of legal proceedings.

In addition, *Adams v Lewis* and *Re Besterman* appear to the author to be typical of cases brought under the Inheritance (Provision for Family and Dependants) Act 1975 in that the end result highlights another problem which increases the scope for legal wrangling and therefore the cost of litigation, which is the lack of definition in the 1975 Act of what is meant by "reasonable financial provision".

A reading of all the case summaries at the back of *Inheritance Act Claims: Law and Practice*, Sidney Ross, 1st edition, Sweet & Maxwell, 2006 has not revealed to the author any clear tariff for determining what is "reasonable financial provision".

Compared to the Inheritance (Provision for Family and Dependants) Act 1975 the Spanish Civil Code is a model of clarity.

The legal aid budget in England & Wales is capped, and, with priority being given to criminal cases, insufficient money is left to fund many a meritorious civil case.

Almost by definition, if an applicant has not been left "reasonable financial provision" they will be short of money, thereby making a legal right to receive "reasonable financial provision" potentially unenforceable because they cannot afford the cost of litigating.

Litigation in Spain is also expensive, but it is the author's view that a simple system of fixed entitlement is going to reduce the likelihood of there being any litigation in the first place, and, if litigation does take place, advising the litigants is going to be easier and cheaper

The Inheritance (Family Provision) Act 1938 was modelled on New Zealand's Testators Family Maintenance Act 1900, which would seem to indicate that the problem of testators/trices being capricious, unfair and irresponsible in their testamentary

dispositions is a trait that some human beings have wherever they might happen to be from in the world, and would therefore apply just as much to Spain as it does to England & Wales.

It therefore remains to be seen how long the Spanish Civil Code will continue to leave surviving cohabitants without any clear entitlement to a share of their deceased "partner's" estate, particularly in the light of the fact that the default matrimonial property regime of community property does not automatically apply to unmarried couples.

In this regard some of the regions with their own succession laws have given the survivor of a stable relationship the same rights as obligatory heir as they have to a surviving spouse[52].

3. "... the provisions of a Will may cause great disappointment among expectant beneficiaries, resulting sometimes in bitterness, acute family conflict, murder or even war."[53]

"The future well-being of [the testator's/trix's] family (and not only its financial well-being but its harmony, because an unfair or inadequate Will can create lasting grievances) depends to some extent upon its provisions."[54]

"By narrowing the testator's choice – presumably mainly in favour of the family – there is less risk that the testator will upset those close to him by leaving property in some unexpected and perverse manner. The potential for harm (in the sense of bitterness among those close to the testator/trix) inherent in unrestricted Will-making would be reduced in a system of fixed or discretionary rights of inheritance …"[55]

[52] Navarre Law 6/2000, of 3 July; Balearic Islands Law 18/2001, of 19 December; Catalan Law 10/1998, of 15 July.

[53] *Textbook on Succession*, Andrew Borkowski, 2nd edition, Oxford University Press, 2002, at page 254.

[54] Butterworths Wills, Probate and Administration Service, looseleaf work, Chapter 2, in the paragraph headed "The importance of a Will".

[55] *Textbook on Succession*, Andrew Borkowski, 2nd edition, Oxford University Press, 2002, at page 256.

It is the author's view that the Spanish system does considerably reduce the scope for bitterness amongst close family members compared to the English model.

Spain does not have a body of law called equity and, in particular, there is no equivalent to proprietary estoppel in Spanish law.

A number of "common expectation"[56] cases involve the estoppel claimant being given an assurance of entitlement, the estoppel claimant then acting to their detriment in reliance on that assurance of entitlement, and then not being left by Will (or otherwise) what they had been assured they would get, and it being considered unconscionable in the circumstances to resile from the assurance of entitlement.

Inwards and Others v Baker [1965] 2 QB 29 is one such case. Taking the facts from the judgment of Lord Denning MR in the Court of Appeal "In this case old Mr Baker, if I may so describe the father, in 1931 was the owner of a little over six acres of land at Dunsmore in Buckinghamshire.

His son, Jack Baker, was living in those parts and was thinking of erecting a bungalow. He had his eye on a piece of land, but the price was rather too much for him. So the father said to him: "Why not put the bungalow on my land and make the bungalow a little bigger."

That is what the son did. He did put the bungalow on the father's land. He built it with his own labour with the help of one or two men, and he got the materials.

He bore a good deal of the expense himself, but his father helped him with it, and he paid his father back some of it. Roughly he spent himself the sum of £150 out of a total of £300 expended.

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56 Following the classification given in *Elements of Land Law*, Kevin Gray and Susan Francis Gray, 4th edition, Oxford University Press, 2005, p 959. The other types of proprietary estoppel cases are "unilateral mistake" and "imperfect gift" cases, neither of which is relevant to this dissertation.

When it was finished, he went into the bungalow; and he has lived there ever since from 1931 down to date. His father visited him from time to time.

In 1951 the father died. The only Will he left was one he made as far back at 1922 before this land was bought or the bungalow was built.

He appointed as executrix Miss Inwards, who had been living with him for many years as his wife and by whom he had two children. He left nearly all his property to her and her two children. He left his son, Jack Baker, £400.

Miss Inwards appointed her two children as trustees of the Will with her. The trustees under the Will did not take any steps to get Jack Baker out of the bungalow. In fact they visited him there from time to time.

They all seem to have been quite friendly, but in the year 1963 [Miss Inwards and her two children] took proceedings to get Jack Baker out. Miss Inwards died during these proceedings. Her two children continue the proceedings as the trustees of the father's Will.

Jack Baker lost at first instance, but the Court of Appeal ordered that judgment be entered in his favour allowing him to "remain there as long as he desires to as his home."

Lord Denning's reasoning was "It is quite plain from those authorities[57] that if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to enable him to stay. He has a licence coupled with an equity. …

[57] The cases cited by Lord Denning are *Dillwyn v Llewelyn* (1862) 4 De G F & J 517, 45 ER 1285; *Plimmer v Wellington Corporation* (1884) 9 App Cas 699; *Ramsden v Dyson* (1866) LR 1 HL 129.

… it seems to me, from *Plimmer's* case in particular, that the equity arising from the expenditure on land need not fail "merely on the ground that the interest to be secured has not been expressly indicated … the court must look at the circumstances in each case to decide in what way the equity can be satisfied.""

It is the author's view that, although unlikely to apply to the particular facts of *Inwards v Baker*, a relatively simple system of fixed entitlements would reduce the likelihood of assurances of entitlement being given in the first place because people would know that they could not make large gifts that disinherit obligatory heirs.

What would have applied to *Inwards v Baker* is the fact that under a system of fixed entitlements similar to that contained in the Spanish Civil Code "old Mr Baker" could not have validly made the testamentary dispositions that he made in 1922 giving everything to Miss Inwards and her two children, with his son Jack Baker being left £400 unless the £400 genuinely represents at least Jack Baker's minimum entitlement as an obligatory heir, and, on the facts as described in the law report, this would appear to be extremely unlikely.

A system of fixed entitlements similar to that contained in the Spanish Civil Code would make it much easier for legal advisers to determine what beneficiaries are likely to be awarded than a system where "the court must look at the circumstances in each case to decide in what way the equity can be satisfied."

4. Threatening people with disinheritance if they do not "behave" can be unjustifiably oppressive and potentially an abuse of power.

Abusing one's economic power and being oppressive towards people are "distasteful" aspects of human nature, and having fixed entitlements on succession would help curtail such baser human instincts.

5. It is "a simplistic view of what motivates people to work or accumulate wealth" to assume that testamentary freedom is an incentive to the accumulation of wealth and that family members with no clear expectation in a share of the inheritance might work harder than those who have no clear expectation in a share of the inheritance.

It is the author's view that whilst second and subsequent sons of the aristocracy of England & Wales will have been obliged to find work, there is absolutely no evidence to suggest that all first born sons of the aristocracy fell into a languid torpor simply because they were guaranteed to inherit vast wealth when their father eventually died.

Some jobs are unpleasant and people do them because they have no alternative if they are to earn a living, but very many people continue to work long after it has ceased to become economically necessary for them to work because they like it.

If testamentary freedom specifically encourages people to work and accumulate wealth then the people living in the Basque province of Alava (which has got testamentary freedom) should be significantly wealthier than their counterparts in the rest of Spain, (which does not have testamentary freedom), but the author is not aware of this being the case.

6. A dead person cannot own property.

It is therefore argued that it should not be possible to give away by Will what one does not own, and Mr Borkowski[58] cites Blackstone's *Commentaries on the Laws of England*, Book II, Ch 1, 10 in support of this view.

Taken to its logical conclusion this particular argument means that the rules of intestacy should always apply.

[58] *Textbook on Succession*, Andrew Borkowski, 2nd Edition, Oxford University Press, 2002, at page 255.

The author's view is that whilst it is important that a testator/trix not be able to thwart the reasonable expectations of relatives and society in general by making a Will that is unfair, capricious and/or irresponsible, that giving people a measure of testamentary freedom is both of practical benefit to society and just, because it would allow testators/trices to:
(i) direct assets to those relatives who might need the money the most, and/or

(ii) reward people who had helped them at difficult moments in their life, and/or

(iii) make specific gifts of a sentimental nature to friends and relatives.

Testators/trices do own the property, not only at the time of making the Will, but also right up to the point when they die and their Will therefore comes into effect.

The real question is whether being able to give away freely to whomsoever one wishes should be limited to, for example, one third of a person's net estate (as in Spain when there are surviving issue) with the rest compulsorily going to specified close relatives, or whether it is better to allow testators/trices to give away their entire estate to whomsoever they wish, subject to the Inheritance (Provision for Family and Dependants) Act 1975.

In the opinion of the author the better system is the Spanish system of community property and obligatory heirs, with the only thing requiring amending from the general drift of the Spanish Civil Code to make it appropriate for England & Wales (and better for Spain) is to provide some special rules for the aristocracy, farms and other privately owned businesses.

Excessive subdivision of agricultural land as a cause of rural poverty was noted as a matter of extreme concern already in 1863 by the Spanish author Mr Fermín Caballero, in 1900 by Mr Diego Pazos, and as the 20th Century progressed by others, with the result that eventually on 20 October 1952[59] the first law was passed that allowed the authorities to compulsorily join small plots of land together to make them more economic to work.[60]

[59] Others include the Agrarian Development and Reform Law 118/1973

[60] *Introducción a la economía española*, Ramón Tamames, 14ª edición, Alianza Editorial, 1982, p 82-83.

To continually divide up estates (more or less) equally between descendants is almost inevitably going to mean fairly quickly the end of many a "business" as a going concern.

THE RULES OF INTESTACY

When a person dies without having made a Will, or where for any reason a Will does not dispose of all of a deceased's property, the rules of intestacy will determine where the property not covered by a Will must go.

In Spain the rules of intestacy only apply to such part of a deceased's estate that does not have to go to the obligatory heirs.

Spain

Whilst the Spanish Civil Code applies to most of Spain, some regions have their own succession laws, and whilst they all have (to a greater or lesser extent) the same heirs, they are surprisingly different.

It is worth covering some of the different rules of intestacy, (if not actually all of them), in order to get an idea of how much the rules can vary throughout Spain.

Navarre

Navarre's articles (ie sections in English Acts) are called "laws".

Law 304[61]. "[Intestate] succession of "non-troncal"[62] assets is governed by the following order, with each [paragraph] only being applicable if there is no-one coming within an earlier paragraph, and if there is someone in one paragraph then those coming in later paragraphs do not inherit anything.

1. Legitimate children, those [lawfully] adopted, and those who are illegitimate [and] whose parentage has been legally confirmed, in equal shares, per stirpes.

2. Full brothers and sisters in equal shares, with the issue of those who predecease the deceased taking in representation.

[61] Law 1/1973, of 1 March. Compilation of Navarre Civil Law.

[62] "Troncal" is defined in law 306. "Troncal assets are immovable properties that the deceased has acquired for free from relatives up to the fourth degree (ie first cousins), or by exchanging other troncal assets. …"

3. Half brothers and sisters in equal shares, with the issue of those who predecease the deceased taking in representation.

4. The most closely related ancestors[63]. If there is more than one line, the inheritance will be divided equally between both, and within each line, in equal shares.

5. The [surviving] spouse or partner from a stable relationship[64] who has not been excluded from the fidelity life interest in accordance with law 254.[65]

6. Relatives from the collateral lines not included in paragraphs 2 and 3 up to the sixth degree[66], without distinguishing between those who are of the full blood or half blood, nor which line they are from, with the closest related excluding those more distantly related, not per stirpes, and always in equal shares.

7. If there aren't any of the abovementioned relatives, the assets go to the Regional Government of Navarre which will divide the inheritance between charitable institutions equally between those at regional level and those at municipal level.

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[63] This means that if the deceased's parents are still alive, they will inherit in equal shares. If only one parent is still alive, then that parent takes everything. If there are no surviving parents, but there are some surviving grandparents from both the mother's side of the family and from the father's side of the family, the estate is divided into two equal halves so that the mother's side gets one half and the father's side gets one half, regardless of whether both maternal or paternal grandparents are still alive or just one. If, for example, both maternal grandparents are alive then they share equally the half that goes to the mother's side of the family, and if just one paternal grandparent is still alive he or she takes the full half share that goes to the father's side of the family.

[64] The bit about a surviving partner from a stable relationship was inserted by [Navarre] Law 6/2000 of 3 July.

[65] It is important to note that although on a first reading of the Navarre rules of intestacy a surviving spouse does not appear to get anything if there are surviving issue, in fact Law 253 gives the surviving spouse a life interest (as an obligatory heir) over the entire estate of the deceased, which he or she only loses in accordance with Law 254 if the spouses were separated at the time of death of the intestate.

[66] Article 918 of the [Spanish] Civil Code says that brothers are two degrees or grades apart, a deceased is three from an aunt or uncle, four from a first cousin, and so on. Each generation is one degree. A son is one degree from his father or mother, but two from a grandparent and three from a great grandparent. Collaterally, for brothers you count one degree up to a parent and then one degree back down again to the brother, hence the reason why article 918 states that brothers are two degrees or grades apart. For aunts, uncles and cousins you need to count up to a common grandparent and then down again.

Law 305. "[Intestate] succession in troncal assets takes place when the deceased has not disposed of those assets [by Will] and dies without issue who inherit in accordance with paragraph 1 of law 304."

Law 307. "Relatives of the deceased inherit troncal assets that belong to their side of the family in accordance with the following order:
1. Brothers and sisters, without preference between those of the whole blood or the half-blood, per stirpes.

2. The closest surviving ancestor.

3. The other collateral relatives up to the fourth degree, with those most closely related excluding those more distantly related, not per stirpes, in equal shares; but if there are non-troncal ancestors of the deceased, these will have, even if they remarry, a life interest in the troncal assets.

If there aren't any of the abovementioned relatives, succession follows that stipulated in law 304."

In short, troncal assets go first to issue per stirpes, but if there are no issue then they go to siblings of the deceased per stirpes, followed by the closest surviving ancestor, followed by aunts and uncles, and then first cousins.

Catalonia, the Balearic Islands, Galicia, the Basque Country and *Aragón* also have their own rules of intestacy, but with citing parts of the rules for *Navarre* and *the Spanish Civil Code* the main possible variations have been adequately covered.

The Spanish Civil Code
Article 912. "Intestate succession takes place:

1. When one dies without having made a Will, or the Will is null and void, or the Will later became invalid.

2. When the Will does not have an inheritor of all or part of the assets [of the deceased], …"

Article 924. "The right of representation is that which the relatives of a deceased have to succeed in all the rights that the deceased would have had had he or she been alive …"

Article 926. "Whenever one inherits by representation, the estate is divided per stirpes, with the result that the representative or representatives do not inherit more than the person they represent had he or she been alive."

The effect of articles 927 to 954 inclusive is to give the following order of (intestate) succession:

1. The children of the deceased inherit both troncal and non-troncal assets in equal shares, per stirpes[67].

The rules of intestacy have to be read in conjunction with the rules on obligatory heirs.

If, for example, a deceased called Zutano has the following:
(i) a net estate of €300,000,

(ii) a surviving spouse called Cristina, (who was not separated from Zutano under a court order that can no longer be appealed against or under a properly proven mutual agreement), and

(iii) two children called Fulanito and Juanita, (with Fulanito and Juanita both conceived during the marriage of Zutano and Cristina),

[67] Articles 930 to 934 inclusive, which are the rules of intestacy relating to when a deceased has surviving children and/or remoter issue.

then Fulanito and Juanita each get the following:
(a) €50,000 (ie €100,000 in total) immediately, because they are obligatory heirs to an immediately payable one third in equal shares under article 808 (ie half the legitime), plus

(b) an equal share in the one-third the deceased could have given away to whomsoever he wished had he made a Will[68], (but did not), resulting in an intestacy relating to that one-third, (ie again €50,000 each = €100,000 in total).

However, because of the application of article 837, Fulanito and Juanita will only get €25,000 each now (ie €50,000 in total), and the rest (ie the other €50,000) when Cristina dies[69].

(c) The rest, (ie €50,000 each = €100,000 in total), when Cristina dies.[70]

All the above eventually gives the two children the entire estate of their father, Zutano, (ie the entire €300,000).

Cristina, as the surviving spouse, gets the following:
(a) a life interest on the one-third of the deceased's net estate (ie €100,000) that the deceased could have used to benefit a disadvantaged child or children, (but did not give to a disadvantaged child because he did not make a valid Will), and

(b) a life interest on €50,000, because under article 837 Cristina is entitled to a life interest on half the deceased's net estate, (not just on one-third). This €50,000 comes

[68] Article 808

[69] Article 837 gives Cristina a life interest over this particular €50,000 because Article 837 gives a surviving spouse in these circumstances a life interest over half the net estate, which has to be satisfied by giving Cristina a life interest on the one third that can be given as "an improvement" and the rest on such part of the one-third Zutano could have given away freely had he made a Will and gives the surviving spouse a total life interest over one half of his estate. In this instance "such part of the one-third that can be freely given away and which will give a surviving spouse a life interest over one half of the deceased's estate" is this particular €50,000

[70] This is because article 837 gives Cristina a life interest on the one-third that can be used as "an improvement"

from part of the one-third that Zutano could have given to whomsoever he had wished (but did not give to anyone because he did not make a valid Will).

In short, all of the above gives Cristina, as the surviving spouse (with the only other obligatory heirs being the two children conceived with Zutano during their marriage), an usufruct on half of Zutano's estate[71].

When in her turn Cristina dies, Fulanito and Juanita will each get half of the assets on which Cristina had a life interest, because they are the obligatory remaindermen when taking article 808 together with article 837.

If Juanita had died before the deceased and she had two surviving children of her own, then those two (grand)children will take the following:
(a) an equal share of the half that would have gone to Juanita had she not died before the deceased (due to the application of articles 807 and 808) for the €50,000 payable immediately as Juanita's share of the legitime payable immediately (ie €25,000 payable to each child of Juanita = €50,000 in total), and

(b) another €50,000 payable immediately in equal shares (ie another €25,000 payable to each child of Juanita = €50,000 in total) under article 933 (the rules of intestacy).

(c) The children of Juanita will also eventually get an equal share of the one-sixth (ie €50,000, or rather €25,000 each = €50,000 in total) of Zutano's estate that is currently earmarked for a life interest in favour of their grandmother, Cristina, and which would, in the fullness of time, (had their mother, Juanita, lived) gone to their mother, Juanita.

All the above makes the gift to the children per stirpes, with the children of a predeceased parent inheriting in equal shares the share the deceased parent (Juanita) would have got had she survived her father, Zutano.

[71] Article 837

It should be noted that where Juanita predeceases her father, but with there being two surviving children of her own, article 837 does not give Cristina a life interest over half of Zutano's estate, but on just one-third of his net estate. This is because the obligatory heirs are not only children of the deceased, but in this instance also include grandchildren of the deceased, and, therefore, article 834 applies (and not article 837) thereby giving Cristina an usufruct on just the one third that Zutano could have used as "an improvement".

If, on the other hand, Zutano's wife had predeceased him, but both of the children are still alive, then the following occurs to Zutano's €300,000:
(a) Fulanito gets €100,000 immediately as an obligatory heir of one-third and Juanita gets €100,000 immediately as an obligatory heir of the other one-third, (ie the two thirds or €200,000 in total under article 808), and

(b) Fulanito gets €50,000 immediately under the rules of intestacy (article 932) and Juanita also gets €50,000 immediately under the rules of intestacy.

The end result is that Zutano's €300,000 net estate is divided up immediately between his two children in equal shares, with each getting €150,000 immediately.

2. If the deceased has no children or remoter issue, the next in line to inherit are the deceased's parents. The deceased's father and mother inherit in equal shares the non-troncal assets[72].

If one parent predeceased the intestate, leaving just one parent still alive, the surviving parent inherits all the intestate's non-troncal assets[73].

Again, the rules of intestacy have to read in conjunction with the rules on obligatory heirs.

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[72] Articles 936, 942 and 811

[73] Articles 937, 942 and 811

If the deceased, called Zutano, has a net estate of €300,000 consisting of non-troncal assets, a surviving spouse called Cristina, and both his parents called Pepe and Chon, then under article 809 (the rules on obligatory heirs) Pepe and Chon each get €50,000 = €100,000 in total.

Cristina as surviving spouse gets a life interest on one half of the net estate (ie on €150,000) under article 837 because that is what the rules on obligatory heirs give a surviving spouse where there are no surviving children or remoter issue, but where there are surviving parents or grandparents.

Pepe and Chon also get an equal share in €50,000 (ie €25,000 each = €50,000 in total) immediately under articles 935, 936 and 937 (the rules of intestacy), and eventually an equal share in the €150,000 when the surviving spouse, Cristina, dies, also under articles 935, 936 and 937.

If there is no surviving spouse, Pepe and Chon get half the net estate immediately, ie €75,000 each = €150,000 in total, under article 809 (the rules on obligatory heirs), and the other half of the net estate immediately under articles 935, 936 and 937 (the rules of intestacy), giving them the entire net estate in equal shares, ie €150,000 each = €300,000 in total.

If there are troncal assets[74] the rules are a little more complicated in that (if there is no child or remoter issue of the deceased) the troncal assets of a deceased have to go in the first instance back the person(s) who gave the assets to the deceased (article 812) and, if they are not still alive, then to those relatives (up to the third degree, ie up to aunts and uncles in equal shares, under article 811) who belong to the line from which the troncal assets originally came from.

[74] Troncal assets are in this instance those covered by articles 811 and 812, ie movable and/or immovable assets that the deceased acquired for free from one ancestor or from a sibling.

For example, if in addition to the €300,000 net estate in non-troncal assets, the deceased, Zutano, had been given a house by his maternal grandparents, then the house has to go back to such of the maternal grandparents who are still alive, and if the maternal grandparents have both died, then it goes to his mother if she is alive (because she would be the closest surviving relative belonging to the line from which the assets came from).

If neither the maternal grandparents are still alive, nor the mother of the deceased, but there are brothers and sisters of the mother, ie aunts and uncles from the maternal side of the deceased's family, then they inherit the house in equal shares.

If the maternal grandparents predeceased Zutano, and his mother has also predeceased him, and there are no aunts or uncles from the maternal side of the family, then the house is divided up under the same rules as for non-troncal assets.

3. If there are no children or remoter issue, and there are no surviving parents, then under article 810 (the rules on obligatory heirs) and article 938 (the rules of intestacy) the grandparents inherit the non-troncal assets.

If the deceased has grandparents from both sides of the family, then the non-troncal assets are divided up into two equal parts so that one part goes to such of the maternal grandparents as are still alive in equal shares and the other half goes to such of the paternal grandparents who are still alive in equal shares[75].

A surviving spouse gets a life interest on one half of the net estate[76], excluding troncal assets[77].

[75] Articles 938, 940 and 941 (the rules of intestacy) and article 810 (the rules on obligatory heirs).

[76] Article 837

[77] Articles 811 and 812

If the deceased has grandparents from just one side of the family, then the non-troncal assets are inherited by such of those grandparents who are still alive and if more than one in equal shares[78].

In the unlikely event of there not being any parents or grandparents, but there are some surviving great-grandparents, then they take on the same terms as the grandparents.

4. If there are no children or remoter issue, and there are no parents or remoter ancestors, but there is a surviving spouse, then the surviving spouse (who is not separated from the deceased by a court order that can no longer be appealed against or by a properly proven mutual agreement) inherits all the non-troncal assets of the deceased[79].

The estate will include the troncal assets if there are no relatives more closely related to the deceased than an aunt or uncle of the deceased from the side of the family the assets originally came from[80].

At this point there are no more obligatory heirs, so all the non-troncal[81] assets of the deceased follow the rules of intestacy.

5. If there are no children or remoter issue, and there are no parents or remoter issue, and there is no surviving spouse, but there are siblings of the whole blood, then the brothers and sisters of the whole blood inherit the entire estate in equal shares, per stirpes.[82]

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78 Article 810 (the rules on obligatory heirs) and articles 938 and 939 (the rules of intestacy).

79 Articles 943 to 945 inclusive.

80 Articles 811 & 812

81 "Non-troncal" will also include troncal assets for which there are no surviving relatives that come within article 811, ie those related up to the third degree from the deceased and who are from the side of the family from which the assets originally came from.

82 Articles 946, 947 and 948

If there are brothers and sisters of the whole blood, and brothers and sisters of the half blood, the former inherit double the portion of the latter.[83]

If there are only brothers and sisters of the half blood, they inherit in equal shares, per stirpes.[84]

6. If there are not even any brothers and sisters, per stirpes, then aunts and uncles inherit in equal shares, per stirpes, with first cousins being the most distantly related relatives of the deceased who can inherit under the rules of intestacy.[85]

It does not matter if the aunts and uncles are of the whole blood or of the half-blood. They all inherit an equal share.[86]

7. Article 956 provides that in the absence of anyone taking under the above provisions then the State inherits the intestate's estate. The intestate's estate is divided into three. One third goes to what are in essence charitable institutions with a base in the municipality of the deceased. Another one third goes to charitable institutions with a base in the province of the deceased; and the remaining one third goes to reducing the national debt, unless, because of the nature of the assets, the State decides that all or part of the estate should be used for something else.

England and Wales

The Administration of Estates Act sections 46 and 47 (as amended) detail who gets the ownership in equity (which is the only ownership of interest here) of an intestate's estate, the effect of which is as follows:

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[83] Article 949

[84] Articles 950 and 951

[85] Article 954

[86] Article 955

1. If the deceased leaves no issue[87], or parent, or sibling of the whole blood[88], or issue of any sibling of the whole blood, but does leave a surviving spouse (who survives him by at least 28 days)[89], then the surviving spouse inherits the entire net estate of the deceased.

2. If the deceased leaves issue and a surviving spouse then the surviving spouse gets[90]:
(a) all the personal chattels of the deceased,
(b) the statutory legacy[91], (currently £125,000), and
(c) a life interest in half the residuary estate.

The issue get the other half of the residue immediately "on the statutory trusts".

"On the statutory trusts" means that if a child of the deceased has died before the deceased leaving children of his or her own, then those children will take the share that their dead parent would have taken if alive.

"On the statutory trusts" does not limit the substitutionary effect to just one generation as in the example given above, but applies the substitutionary effect successively down the line until there isn't anyone alive to take a dead parent's place.

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87 "Issue" is defined in section 47 and in effect means children, grandchildren, great-grandchildren and great-great-grandchildren etc which reach the age of 18 or marry under that age.

88 "siblings of the whole blood" are brothers and sisters who have the same parents, as opposed to "half-blood" which means that they only have one parent in common.

89 Section 1 of the Law Reform (Succession) Act 1995 added what is in effect a "survivorship clause" to the provisions of the Administration of Estates Act 1925 relating to a surviving spouse, so if the surviving spouse does not in fact survive the intestate by the full 28 days it is as if the deceased died without a surviving spouse and the rules of intestacy are applied accordingly.

90 It was recommended by the Law Commission that the surviving spouse get the entire net estate, but the government rejected this recommendation. Law Com No 187, 1989.

91 Under the Administration of Estates Act 1925 s46 as originally drafted the "statutory legacy" was £1,000. This sum was increased to £5,000 by the Intestates' Estates Act 1952, to £8,750 under section 1 of the Family Provision Act 1966 "or of such larger amount as may from time to time be fixed by order of the Lord Chancellor", and was regularly increased by statutory instrument ever since until set by the Family Provision (Intestate Succession) Order 1993 (SI 1993 No 2906) to the current £125,000.

The issue also get to inherit the other half of the residuary estate when the surviving spouse eventually dies.

3. If the deceased does not leave any issue, but does leave a brother or sister of the whole blood, or issue of a brother or sister of the whole blood, and a surviving spouse, then the surviving spouse gets:
(a) all the personal chattels of the deceased,
(b) the statutory legacy[92], (currently £200,000), and
(c) half the residuary estate "absolutely", ie not a life interest.

The surviving brothers and sisters of the deceased share equally the other half of the residuary estate, "per stirpes", eg if a brother of the deceased has died before the deceased leaving children of his own, then those children will divide up equally amongst themselves the share their father would have taken had he survived the deceased.

4. If the intestate died leaving children or remoter issue, but no surviving spouse, then the children and remoter issue get the entire net estate, per stirpes.

5. If the intestate died leaving no issue and no surviving spouse, but did leave surviving parents, then the parents get the entire net estate, in equal shares.

6. If the intestate died leaving no issue and no surviving spouse, but did leave a surviving parent (ie not both parents survived), then the surviving parent gets the entire net estate.

7. If the intestate died leaving no issue, no surviving spouse, and no surviving parents, but did leave surviving brothers and sisters of the whole blood or their issue (in effect nephews and nieces of the intestate), then the brothers and sisters get the entire net estate in equal shares, per stirpes.

8. If the intestate died leaving no issue, no surviving spouse, no surviving parents, and no surviving brothers and sisters of the whole blood or their issue, but did leave surviving

[92] Set by the Family Provision (Intestate Succession) Order 1993 (SI 1993 No 2906)

brothers and sisters of the half blood or their issue, then the brothers and sisters of the half blood get the entire net estate in equal shares, per stirpes.

9. If the intestate died leaving no issue, no surviving spouse, no surviving parents, no surviving brothers and sisters of the whole blood or their issue, and no surviving brothers and sisters of the half blood or their issue, but did leave grandparents, then the grandparents get the entire net estate in equal shares.

10. If the intestate died leaving no issue, no surviving spouse, no surviving parents, no surviving brothers and sisters of the half blood or their issue, no surviving brothers and sisters of the half blood or their issue, and no surviving grandparents, but did leave full brothers and sisters of either or both parents of the intestate or their issue (in effect cousins of the deceased, with no limit how far down the line one has to go, so it is not just first cousins who can inherit under the rules of intestacy), then those uncles and aunts get the entire net estate in equal shares, per stirpes.

11. If the intestate died leaving no issue, no surviving spouse, no surviving parents, no surviving brothers and sisters of the half blood or their issue, no surviving brothers and sisters of the half blood or their issue, and no surviving grandparents, but did leave half brothers and sisters of either or both parents of the intestate or their issue, then those uncles and aunts get the entire net estate in equal shares, per stirpes.

12. If the intestate has not got even a surviving direct descendant of an aunt or uncle, then the estate belongs to the Crown, the Duchy of Lancaster or the Duke of Cornwall as the case may be.

Conclusion

The most striking difference between England and Spain is the provision made for a surviving spouse.

The English rules of intestacy give a surviving spouse a very substantial absolute interest, (of varying proportion), whilst Spain (on the whole) gives a surviving spouse a life interest (of varying proportion) via the rules on obligatory heirs.

The reason why a surviving spouse gets so little in Spain compared to England & Wales is because the default matrimonial property regime of community property means that half of the profits of the marriage have been acquired by a surviving spouse whilst the marriage subsisted and therefore giving a surviving spouse a life interest over a proportion of a deceased's net estate gives an end result that appears to the author to be remarkably similar to the English rules of intestacy.

Without a change in the matrimonial property regime in England and Wales to community property, the Spanish rules for most of the regions would probably not provide adequately for a surviving spouse if applied to England and Wales.

"A survey of Wills was conducted in order to ascertain the type of provisions that testators commonly made in Wills[93]" and the rules of intestacy were drafted with the results of that survey in mind. The intention was "to reflect the wishes of the average testator".

"The Law Commission itself stated[94]:

> There are a number of principles upon which the rules of intestacy might be based and in our working paper [No 108] we canvassed the respective merits of the presumed wishes of the deceased, the needs and deserts of the survivors, and the status of the surviving spouse. The present law is based upon a combination of these, although the underlying object has been to do what the deceased himself, or herself, might have wished."[95]

[93] *Textbook on Succession*, Andrew Borkowski, 2nd edition, Oxford University Press, 2002, at p 7
[94] Law Com No 187, 1989, para 24

[95] *Textbook on Succession*, Andrew Borkowski, 2nd edition, Oxford University Press, 2002, p 7

In the event of there being no relatives capable of inheriting it is the author's opinion that many in England & Wales might prefer the Spanish system of an intestate's estate being used for charitable purposes in the geographical area where the intestate had his or her habitual residence, (rather than go to the Crown or the Duchy of Lancaster or the Duke of Cornwall).

However, for the rest, given the completely different rules as to matrimonial property regimes in the two countries, it seems to the author that the overriding concern in both countries has been to provide for the surviving spouse and the children, and that there is little to criticise in either sets of rules in that regard.

In any event, as the Law Commission stated[96]:

> "The rules of intestacy inevitably cannot provide for every situation. They can only hope to provide a solution which is fair and reasonable in the general run of cases."[97]

[96] Law Com No 187, 1989, para 6.

[97] *Textbook on Succession*, Andrew Borkowski, 2nd edition, Oxford University Press, 2002, p 7

MAKING A WILL AND IMPLEMENTING IT

This chapter is about the procedure and formalities involved in making a Will and implementing it, and whether England can learn anything from Spain in this area.

Spain

There are a number of different ways of making a Will in Spain. The main one is described in article 694 of the [Spanish] Civil Code which says that it is one that is "executed in the presence of a Notary duly authorised to practise as a Notary in the place where it is executed."

Article 695. "The testator/trix will state orally or in writing their last wishes to the Notary. The latter having drawn up the Will in accordance with the wishes of the former and stating therein the place, year, month, day and time of its execution and after advising the testator/trix of their right to read it themselves, the Notary will read it out loud so that the testator/trix can state if it is in accordance with their wishes. If it is, it will be signed there and then by the testator/trix if they can and, if appropriate, by the witnesses and other persons who should be there. …"

Numerous judgments of the [Spanish] Supreme Court make it absolutely clear that a failure to comply with the formality requirements will result in the Will being invalid.[98] Even failing to put in the time at which the Will was signed will result in the Will being invalid, as stated in the judgment of the Supreme Court of 18 June 1896.

Article 696. "The Notary will state that they know the testator/trix or of having identified them in an appropriate way, and, in the absence of which, will make the declaration provided for in article 686. [The Notary] will also state that, in their opinion, the testator/trix has sufficient legal capacity to make a Will."

Article 686. "If it was not possible to identify the testator/trix in the manner stipulated in the previous article [685], this will be stated by the Notary, or by the witnesses if

[98] Judgments of the [Spanish] Supreme Court of 28 October 1965 and 27 September 1968, amongst others.

appropriate, giving details of the documents that the testator/trix provided with the aim of identifying themselves and their personal details. …"

Article 685. "The Notary must know the testator/trix and if [the Notary] does not know [the testator/trix] the latter will be identified either by two witnesses who know the testator/trix and who are known to the Notary or by identity documents issued by the authorities. The Notary must also assure themselves that, in their opinion, the testator/trix had the necessary testamentary capacity. …"

In short, the Civil Code is very strict in stipulating that the Notary ascertain the identity of the testator/trix.

Article 1216 of the Civil Code provides, inter alia, that public documents are those authorised (ie signed) by Notaries.

Article 1217. "Those documents in which a Notary Public takes part are regulated by notarial legislation."

In addition to the Civil Code there is the Decree of 2 June 1944, by which is passed the Regulations covering the Organisation and [Legal] Regime of Notaries, the short title being "The Notarial Regulations".

Article 143 of the Notarial Regulations. "For the purposes of article 1217 of the Civil Code notarial documents are regulated by the rules contained in this part [of the Notarial Regulations].

Last Will and Testaments are regulated as regards their formalities by the Civil Code, with the [Notarial Regulations] as supplementary to the [Civil Code] insofar as [the Notarial Regulations] do not modify those contained in the Civil Code. …"

The Notarial Regulations are extraordinarily prescriptive, with nothing comparable in English law. They even order a Notary to make sure that copies "look good".[99]

If ordinary sheets of paper are being used, article 154 obliges each and every page to be signed by the testator/trix and the Notary, and each page must be numbered consecutively.

In short, the Notarial Regulations are specifically designed to make it hard for Wills to be forged, or have bits inserted or deleted by anyone other than the testator/trix and the Notary.

The closest English law comes to the [Spanish] Notarial Regulations is to be found in the provisions of the Administration of Justice Act 1982 relating to international Wills, which are not yet in force and which probably should not ever come into force as currently drafted.[100]

Article 161. "A person's nationality or region, when it might influence their capacity and they are executing the document away from their own region, must necessarily be stated in the document."

In the case of British nationals making a Spanish Will, it will be stated in the Will that they are British, although in the opinion of the author it would sometimes help if Spanish Notaries could ask testators/trices if they consider themselves as being English/Welsh, Scottish or Northern Irish, and their reply written into their Will. This is because Spanish private international law is nationality based,[101] and the United Kingdom is (also) not a unitary state when it comes to succession law.

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[99] Article 247 of the Notarial Regulations. "Decorous" is the word actually used.

[100] The reasons why the provisions relating to international Wills in the 1989 Act should probably never come into force are given further on in this dissertation.

[101] Article 9-8 of the Spanish Civil Code "Succession caused by death is ruled by the national law of the deceased at the moment of death whatever the nature of the assets and the country in which they are situated."

Article 163. "Indicating the identity documents [used] is obligatory when drafting [Wills] when the law specifically requires [their use]. …"

In short, Spanish Wills will normally contain full details of the passport or National Identity Document used.

Decree 196/1976, of 6 February, Regulating the Compulsory Nature of Possessing a National Identity Document, makes it compulsory for all Spaniards resident in Spain aged 14 and older to have a National Identity Document, with fines for non-compliance.[102]

[102] Article 4 of Decree 196/1976, of 6 February, states that "In the national identity document there will be the [holder's] personal details, photograph and finger print that are evidence of the existence of the holder, as well as their address, the date of issue and a number which does not change over time and which guarantees [that the identity document] is not transferable."

Article 5 of Decree 196/1976. "The national identity document will contain a photograph of the front of the face of the holder and with nothing on top of their head, as well as a finger print, which will be the index finger of the right hand.

If it is not possible to get a finger print [of the index finger of the right hand], due to mutilation or physical defect, another finger will be used, with an indication of which finger was used; if there isn't any finger that can be used, this will be stated [on the identity document] together with the reason why.

The personal details that article 4 of the Decree refers to are: the given name and surnames of the holder, and the given names of the parents, … ; as well as the sex of holder, and their date and place of birth.

Once the National Identity Document has been filled in, it will be signed by the holder as evidence as to the holder's agreement with the accuracy of the information contained therein."

Article 6. "The national identity document will be made via processes and using such materials as will give a minimum level of quality and inalterability, and the maximum guarantees possible that it cannot be falsified. …"

The original Will goes on to form part of the Notarial Protocol.[103] Testators/trices are only given a transcription of the original.[104]
Article 36 of the Notarial Law. "The Protocols belong to the State. The Notaries will look after them …"

Article 279 of the Notarial Regulations. "The Notaries and Archivists are responsible for the completeness and conservation of the protocols. …

If they deteriorate due to their lack of diligence, the Notaries and Archivists are obliged to have them restored at their expense, and will also be disciplined for it."

Article 280 of the Notarial Regulations deals with how deteriorated and/or destroyed protocols are reconstructed. It is very detailed and thorough.

In short, testators/trices are never given the original Wills, but only a certified transcription. The original Wills are kept by the Notaries,[105] and if the originals are destroyed an effort is made to reconstruct them.

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[103] Article 272 of the Notarial Regulations of 1944 "The Notarial Protocol is comprised of the public instruments and other documents incorporated within it during the year, counting from 1 January to 31 December inclusive, even if during the year in question the Notary has left that office and there is now a new Notary."

Article 144 of the Notarial Regulations states that "Public instruments includes … in general, all documents authorised (ie signed and sealed) by the Notary …"

So Wills signed and sealed by a Notary are public instruments that go on to form part of the Notarial Protocol.

[104] Article 17 of the Notarial Law of 1862 states in its third paragraph that the grantors (ie the testator/trix in the case of a Will) have the right to a first copy. The Notarial Law is from 1862 and is pre-photocopier. A first copy is a transcription of the original authenticated by a Notary, not a photocopy certified as being a true copy of the original. This has important implications for contentious probate claims because nothing less than a court order will be needed to look at the original Will to see, for example, the actual signature of the testator/trix. It is my view that this needs to be updated to take into account the fact that photocopiers have developed sufficiently to make transcriptions second rate evidence compared to certified photocopies.
[105]
As explained later on in this dissertation, the [English] Administration of Justice Act 1982 in my opinion goes in entirely the wrong direction, and in essence I think that it is the general drift of the Spanish system that should be copied in England & Wales, ie solicitors who prepare the Wills should look after the originals, with a photocopy being given to the testator/trix.

Eventually, the protocols are put into long-term storage. Article 289 of the Notarial Regulations. "There will be a general archive of protocols at the head of each notarial district."

Article 291. "The general archives of protocols will be comprised of general protocols of more than 25 years of age …"

Spain has a central Wills Registry based in Madrid. It was set up by a Royal Decree of 14 November 1885, and it works well.

Article 4 of the 1885 Royal Decree was amended by Royal Decree 1368/1992, of 13 November and it currently states that "The General Registry of Last Wills & Testaments is computerised. Regarding each testator/trix it will have: their given name, their surnames, place of birth and their National Identity Document [number]; their marital status, stating the spouse's given name and surnames, if married, and the name of their parents. There will also be the name and surnames of the Notary or civil servant who authorised the Will, or the judge or court that ordered that it be authorised and placed in a protocol; the place and date of the last Will & Testament and whatever other fact that it might decide to require."

Article 11 of the 1885 Royal Decree in effect provides that Notaries who witness Wills must within three days of the making of a Will send to their respective College of Notaries the information sought in article 4. If they could not get any or all of the information sought in article 4, they must say that what there is was all they could get hold of.

Article 13. "The information [in article 4] will be sent to the General Wills Registry …"

There is no fee payable to the General Wills Registry when registering Wills.

The Notarial Regulations of 1944 make a failure to comply with regulations a disciplinary offence.

Depending on the gravity of the disciplinary offence, the Notary, amongst other things, can be given a caution, fined, suspended, passed over for promotion, and/or be forcibly moved to another office.

Article 737 of the [Spanish] Civil Code provides that "All testamentary dispositions can be revoked, even if the testator states to the contrary in the Will. …"

Article 738. "A Will cannot be revoked wholly or in part except with the formalities for making a Will."

Article 739. "An earlier Will is revoked by a valid later one, provided that the testator/trix did not state in the latter the wish that the former remain valid wholly or in part. …"

It is the view of the author that this is how it should be in England & Wales for the revocation of Wills.

Section 20 of the Wills Act 1837 states that "No Will or codicil … shall be revoked otherwise than … by another Will or codicil … declaring an intention to revoke the same … or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

The author considers that revocation by "burning, tearing, or otherwise destroying the same …" should be repealed, because it is always going to be difficult to know if the destruction of the Will was done with an intention to revoke it or not, and in a system of compulsory registration and deposit, the facility of revoking a Will by destroying it becomes redundant.

When a person dies it is normally the beneficiaries who do the probate in Spain. Sometimes a Spanish Will appoints a person to be an executor,[106] but executors cannot

[106] A detailed exposition of their powers and functions is to be found in a book called *Las Facultades del Contador-Partidor Testamentario* by Dr Marta Carballo Fidalgo, First edition 1999, Civitas.

also be beneficiaries and they normally only add to the cost of doing the probate, without making it easier.

In the opinion of the author the only time an executor is needed is if it is considered useful to have an independent third party (already appointed by the testator/trix, and not the court) to divide up the estate amongst the heirs after the testator/trix has died.[107]

When a person dies the people who think that they might be beneficiaries must first get a certificate from the Madrid Wills Registry to see if the deceased made a Will that was registered[108].

The procedure is either to go personally to the Wills Registry in Madrid with a certified copy Spanish death certificate and the pre-payment "voucher" obtainable at a tobacconist, or to do it by post by sending those two items in by mail.

As someone based abroad the author cannot get the pre-payment vouchers, and the Madrid Wills Registry accepts a €5 note instead.

Assuming that the certificate states that a Will was made, the next step is to get an authorised copy of that Will.

The notary will issue an authorised copy to whoever is mentioned in the Will as being a beneficiary, or to a close relative of the deceased even if not mentioned as a beneficiary in the will.[109]

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[107] The alternative is that the testator/trix divide up the estate already in the Will, but quite often this simply won't be possible because testators/trices won't know what precisely they'll be leaving their heirs when making their Will, because, of course, there is a time-gap between making a Will and it having to be implemented in which the size and composition of the estate can have changed a lot.

[108] See Appendix B, which is a photocopy certificate from the Madrid Wills Registry indicating that the deceased did not make a [Spanish] Will.

See also Appendix C, which is a photocopy certificate from the Madrid Wills Registry indicating that the deceased did make a [Spanish] Will, and where an authorised copy of it can be obtained, ie from the Notary who prepared the Will in the first place.

[109] Article 226 of the Notarial Regulation, Decree of 2 June 1994. "Whilst the testator/trix is alive, only he or she or their attorney can get a copy of the Will.

If the estate is insolvent the beneficiaries would be well advised not to do anything, and leave everything up to the deceased's creditors to try and sort out. This is because if the beneficiaries accept an inheritance, the acceptance includes the debts.

The author regards this as a weakness in the Spanish system, and feels that the English model whereby the personal representatives can wind up an insolvent estate without being personally liable for the debts is much the better model.

Assuming that the estate is solvent, the beneficiaries have to accept their inheritance. An "escritura"[110] is drawn up listig the assets of the deceased that the beneficiaries are accepting as their inheritance.[111]

The escritura is then the basis on which the beneficiaries pay their respective shares of Spanish inheritance taxes.

Once dead, in addition to the [residuary] beneficiaries under the Will or their representatives, the specific legatees, executors and others who have such powers; the relatives who, if there wasn't a Will or if the Will was invalid would inherit all or part of the estate have a right to [get a copy of the Will]. …"

[110] In his book *The General Notary*, 2nd edition, The Notaries Society 2004, Mr AG Dunford states on page 102 that "No civil law jurisdiction has any concept or will give any regard to the concept, so dear to the common [law] lawyer, of a deed."

The author of this dissertation habitually translates "escritura" as "deed", and whilst a Spanish "escritura" does not comply with section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 which gives the formal requirements of a deed, (because Spanish law has its own formality requirements and there is absolutely no reason why it should adopt the English 1989 Act), the similarity between an "escritura" and a "deed" is, in the opinion of the author, close enough for "escritura" to be translated into English as "deed".

[111] The escritura (deed) is sometimes described as being one of "adjudication", sometimes as one of "acceptance", and sometimes of "adjudication and acceptance" of the inheritance.

In the opinion of the author of this dissertation, it is a document whereby the beneficiaries have asked the Notary to evidence in writing what they are taking, ie if the beneficiaries are more than one, they are adjudicating amongst themselves what they are each going to accept, and then they accept it, so the escritura is (if there is more than one beneficiary) one of adjudication and acceptance, and only of acceptance if there is only one beneficiary.

If there is land included as part of the inheritance, once the Spanish inheritance taxes have been paid, the escritura is taken to the relevant local Property Registry for the people who accepted the inheritance of the land to be registered as the new proprietors.

The Spanish system works well if:
(i) the estate is solvent, and
(ii) the beneficiaries are all *sui juris*, few in number, easily located, and get on well with each other.

The Spanish system does not work particularly well if a beneficiary is a minor or otherwise under a disability, or if there are a lot of beneficiaries (especially if some are hard to locate and/or difficult to get to agree on anything), or if there is a life interest.

Basically, if the beneficiaries are not all *sui juris* and in agreement nothing can be done with the assets they own without a court order. Getting a court order is time-consuming and expensive, and generally fraught with the usual pitfalls of litigation.

England and Wales

When somebody decides that they want to make a Will they'll often use the services of a solicitor or, if they are wanting to skimp (even more) on cost, a completely unregulated[112] Will-writing firm, or even "do-it-themselves".

[112] In 2003 the UK Government commissioned Sir David Clementi to produce a Report on the Regulatory Framework for [the provision of] Legal Services in England and Wales, which was published in December 2004. Sir David noted that Will drafting was a legal service that was completely unregulated, ie absolutely anybody in the country could sell their services to members of the public as drafters of their Wills. It is a regulatory gap that Sir David did not recommend be plugged. In Chapter E, paragraph 25 of his report Sir David appears to suggest that asymmetry of regulation and regulatory gaps "… expands consumer choice: buyers can choose a more expensive service with regulatory protection or a cheaper service with limited protection."

Given that unregulated Will drafters appear to the author to trade using limited liability companies as their preferred business model, and having professional indemnity insurance is not obligatory for them, (some will have such insurance, but some won't), the question is whether members of the public have any meaningful possibility of redress should things go wrong.

When a potential Will client telephones a solicitor, the first thing the client needs to be given is "information about costs"[113], ie the solicitor's terms and conditions of business need to be sent to the client before instructions are taken.

If the client accepts the solicitor's terms and conditions of business, the next step is to take instructions. Sometimes this can be done over the phone, although normally this is done via a face-to-face meeting with the client. There is no obligation to verify the client's identity when drafting or witnessing a Will,[114]and English Wills do not normally give details of the ID of the testator/trix.

When the final version of the Will has been agreed with the client, the next step is to arrange for the Will to be signed by the testator/trix and the witnesses.

Some textbooks on Wills (& Probate) go into great detail regarding the different ways in which a Will can be signed and attested, but the main way is for the testator/trix to sign in front of two witnesses, and for the two witnesses to sign the Will in front of the testator/trix[115].

Whilst the duly signed Will is then often photocopied by the solicitor, and the photocopy is placed in the Will file, there is no legal obligation on the firm preparing the Will to keep a photocopy of it.

The Law Society of England & Wales advises that files be kept for a minimum of six years, but does not "specify how long individual files should be retained"[116], thereby

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[113] Practice rule 15 of the Solicitors' Costs Information and Client Care Code 1999, replacing rule 15 of the Solicitors' Practice Rules 1990.

[114] According to written advice given by the Law Society of England & Wales in 2004, the Treasury has confirmed that Will writing is not generally viewed as "participation in financial transactions" and therefore does not come within the definition of "relevant business" as defined by regulation 2(2)(l) of the Money Laundering Regulations 2003, and therefore is not subject to the legal professional having to obtain "satisfactory evidence" of each client as required by Regulation 4 of the 2003 Regulations.

[115] Wills Act 1837 s.9

[116] *The Guide to the Professional Conduct of Solicitors*, The Law Society, 8th edition, Law Society Publishing, 1999, Annex 12A, p 254.

resulting in the possibility that by the time a testator/trix dies there will be no photocopy of the Will being kept by the solicitors' firm that originally prepared it and therefore making it more difficult to reconstruct the Will if it is lost.

After the signing, the solicitor will then usually ask the client if they want the firm to keep the original Will in their safe, or if the client wants to take the Will home with them.

Some testators/trices want the firm to keep the original, and some want to take the Will home with them.

From a survey undertaken by the author in 2006 absolutely all the solicitors' firms in Sheffield and Manchester doing Wills & Probate who responded to the questionnaire allow original Wills to be deposited with them, and virtually all regard deposited Wills as a valuable source of future instructions.

There is no obligatory registration of Wills in England & Wales. However, it is possible to voluntarily deposit a Will at the High Court. The procedure is described in detail in the *Probate Practice Manual* co-authored by Christopher Butcher and Amanda King-Jones and published as an updateable loose-leaf work by Thomson/Sweet & Maxwell Ltd. It states:

"The procedure for the deposit of Wills is that the testator is given a special Will envelope on the front of which various details have to be completed. These include the names and addresses of the testator and executors. The envelope is then signed and witnessed and returned to [Record Keeper's Department, Principal Registry of the Family Division] First Avenue House, [42-49 High Holborn, London WC1V 6NP] with a letter confirming the wish to deposit the will, accompanied by a fee of £1.00 payable to HM Paymaster General[117].

[117] This is out-of-date as all cheques that used to be payable to HM Paymaster General (or HMPG) are now payable to HM Courts Service or HMCS. Furthermore, the fee is now £15.00, not £1.00.

First Avenue House issue a Certificate of Deposit on receipt. That certificate must be retained safely by the testator because the withdrawal application is on the back. The testator can withdraw his Will during his lifetime on production of the certificate."[118]

The same Probate Practice Manual also states that "There is no unified system of commercial registration of Wills but the authors have been given details of two independent companies.[119]

In January 2006 the author wrote to the Principal Registry of the Family Division asking for more details on how to deposit a Will, and how many were deposited there in the years 2001 to 2005 inclusive. In a letter dated 1 February 2006[120] from the Principal Registry of the Family Division the following information was given to the author.

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[118] The looseleaf work Butterworths Wills, Probate & Administration Service state that the voluntary deposit of Wills & codicils "was set up by the Supreme Court of Judicature (Consolidation) Act 1925, section 172, an enactment now replaced by Supreme Court Act 1981, section 126. Rules are made by Wills (Deposit for Safe Custody) Regulations 1978." It then goes on to describe the system in a slightly different way to the Probate Practice Manual of Christopher Butcher and Amanda King-Jones saying "Deposit may be made at any Registry of the Family Division. If made at the Principal Registry, the Will or codicil may be sent by post by the testator or by any agent authorised in writing by him to do so. If made at any other Registry, it must be delivered personally, either by the testator or by such an agent. The document may be withdrawn subsequently, and the regulations lay down the procedure to be followed on the testator's death."

[119] One is a "Will Registration Centre" at Old Bank Chambers, Market Square, Pontypridd, Mid Glamorgan, CF37 2SY which accepts registration of Wills made in England and Wales. The other is "Wills UK Limited" of Westbourne Manor, Westbourne Road, Edgbaston, Birmingham, B15 3TR which issues credit card type registration details to say where a Will was lodged when it was made.

The author has written to both of the above companies, but without receiving a reply from either of them.

The author has recently received a "mailshot" from a new company called NROW Ltd advertising its "National Register of Wills". The author has tried access the new company's website (www.nrow.co.uk) but only an error message came up on the screen.

Furthermore, it would appear that solicitors' firms have to pay an annual charge to make searches, (which makes it an overhead of the business), rather than an individual search fee for each search, (which would be a disbursement and therefore directly payable by the estate).

The author expects this new attempt at setting up a commercial national register of Wills to fail. There is no compulsion obliging Wills to be registered, so why should financially hard-pressed High Street firms go to the trouble of registering Wills with NROW Ltd? Who pays for the extra work involved? Why should financially hard-pressed High Street firms pay an annual subscription to NROW Ltd?

[120] See Appendix D, which is a photocopy letter dated 1 February 2006 from the Principal Registry of the Family Division of the High Court.

Table 1

Wills deposited in 2001	3,160
2002	2,764
2003	2,469
2004	2,119
2005	1,994

The same letter went on to state that "The fee for placing a Will in safe custody is £15.00 and there is no fee for withdrawing either during life or after death."

The figures are astonishingly low, and the reason can be found in a survey conducted by the author of both Sheffield and Manchester firms of solicitors in February 2006.

The author sent a questionnaire to each Sheffield firm of solicitors[121] that had said over the phone that they did do Wills & Probate and addressed it to the person the author had been told was in charge of Wills & Probate at that firm, or to whoever it should be send to.

The number of letters/questionnaires sent was 34, and 10 replies[122] were received. This was considered to be a poor response rate, so the author considered carefully why this might be, and what was thought to be a suitably amended (and easier) questionnaire was sent to the Manchester firms of solicitors who had said over the phone that they did Wills & Probate.

A questionnaire and covering letter[123] plus stamped addressed envelope was sent to 111 firms in the Manchester area. 32 replies[124] were received back, which is a more or less

[121] See Appendix E, which is photocopy file copy letter dated 31 January 2006 to the Sheffield firm of solicitors called AMS Law as a sample of what was sent to all the Sheffield firms that had said that they did Wills & Probate.

[122] See Appendix F, which is a photocopy of all the postcard replies received from the Sheffield firms of solicitors.

[123] See Appendix G, which is a photocopy file copy letter dated 21 February 2006 to the Manchester firm of solicitors called Wolfsons as a sample of what was sent to all the Manchester firms that had said that they did Wills & Probate.

[124] See Appendix H, which is a photocopy of all the questionnaires returned to the author with any sort of comment(s) on them.

identical response rate to that of the Sheffield firms, albeit with a larger number in absolute terms.

Question 5 asked: "Can Will clients deposit original Wills with your firm? Yes/No." To which 10 Sheffield firms said "Yes" and not a single firm said "No".

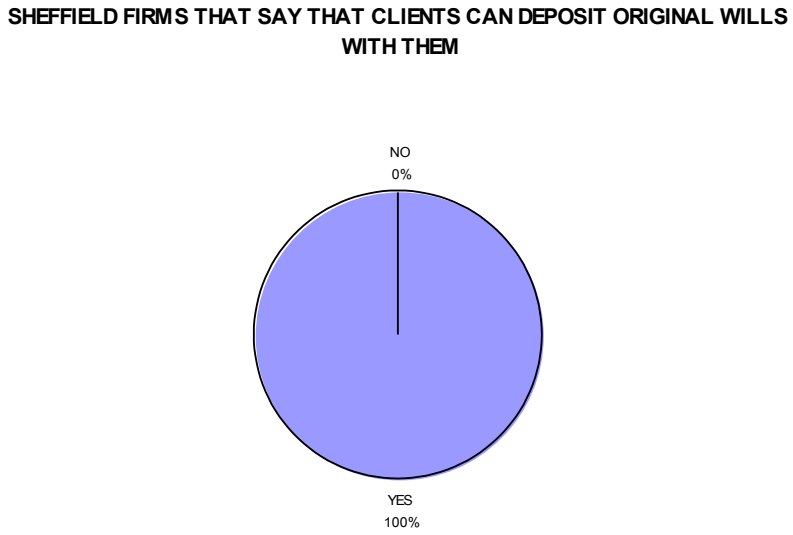

Figure 1

In Manchester the result was identical. 32 firms said "Yes" and not a single firm said "No".

See also Appendix I, which is a photocopy of all the letters received in response to the survey regarding missing Wills.

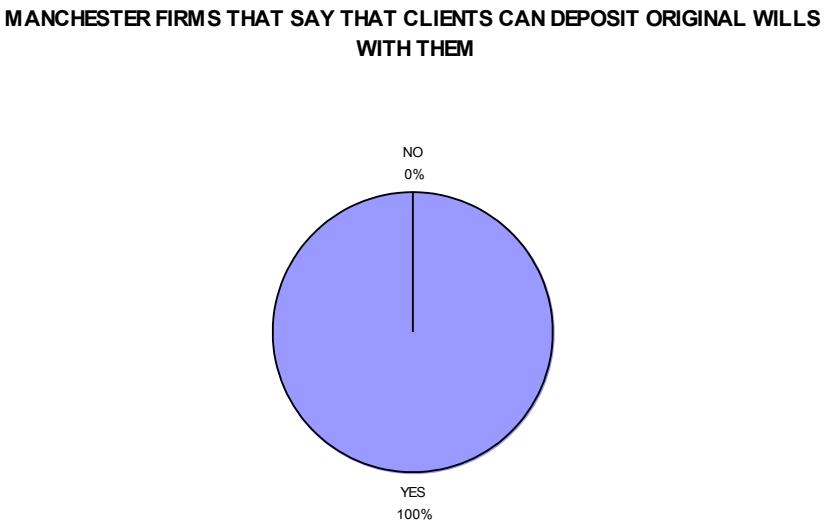

Figure 2

Question 6 asked: "… do you regard deposited Wills as a useful source of future instructions to do the probate? Yes/No."

8 Sheffield firms said "Yes" and not a single firm said "No", although one firm did say that it was "not as useful as it was".

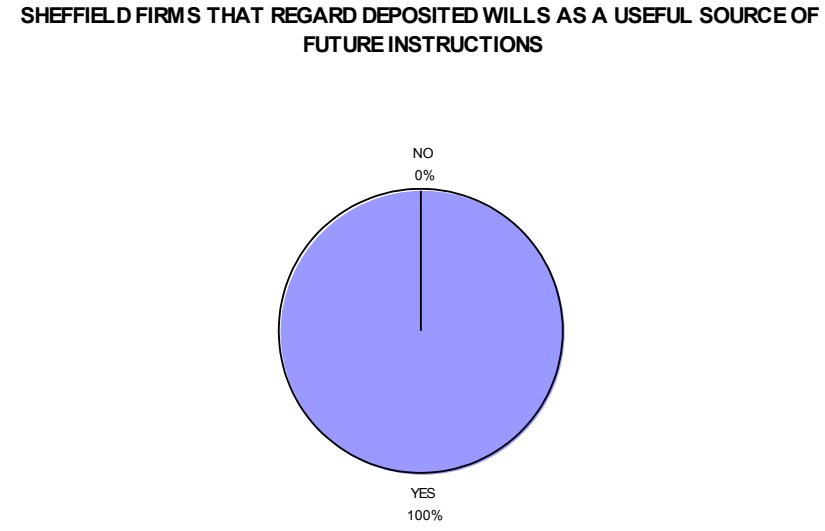

Figure 3

In Manchester 28 firms said "Yes" and only 3 said "No".

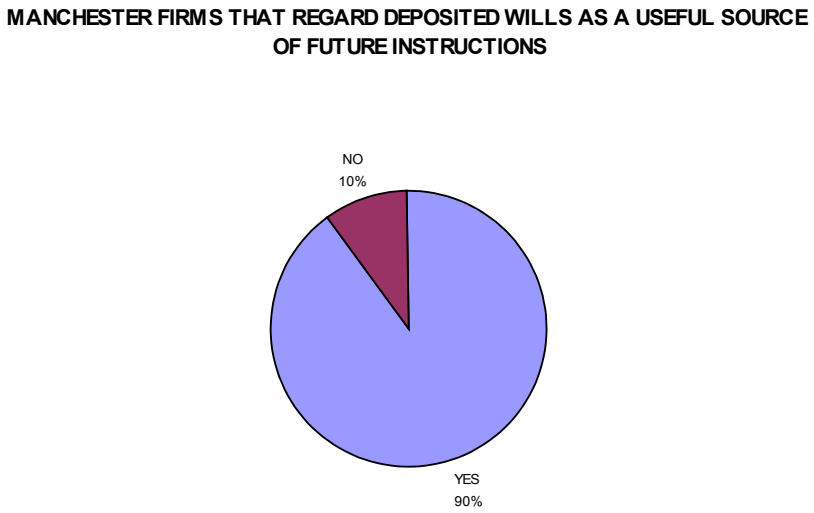

Figure 4

The results of the survey make it abundantly clear why there are so few original Wills deposited with the Principal Registry of the Family Division or with a commercial Wills deposit service. There is hardly a firm in the country that does not see some value in storing original Wills for their clients.

In January 2006 the author photocopied all the pages of the Law Society Gazettes for the years 2004 and 2005 that contained missing wills adverts.

In 2004 the Law Society Gazette[125] had 197 advertisements for missing Wills, and in 2005 it was 162.

[125] See Appendix A. Only a photocopy of the relevant page of the issue dated 8 January 2004 of the Law Society's Gazette is included so as to give an idea of what is meant by "missing Wills advertisements", but there were nearly 100 such pages over the years 2004 and 2005.

Whilst Sweet & Maxwell's Probate Practice Manual[126] states that "If it is thought that the deceased made a Will with a solicitor but it is not known where, a notice should be published in the Law Society Gazette". No authority is cited in support by the authors, and *Tristram and Coote's Probate Practice* by R D'Costa, J I Winegarten, and T Synak, 29th Edition, Butterworths 2002, plus 2005 Supplement, has no such similar stipulation.

Probate and the Administration of Estates: The Law and Practice, Emma Guadern and AK Biggs, Callow Publishing, 2003, p.7 merely states that "Advertisements can also be placed in the Law Society's Gazette."

Whilst inputting the data on a Microsoft Access Database the author noticed that in 2004 there wasn't a single Sheffield firm advertising for missing Wills, and yet the author receives around one letter a year from one Sheffield firm or other asking if he might have the original Will of someone; ie only a few firms with missing Wills advertise in the Law Society Gazette.

The author wrote to Mr Burch, the Manchester District Probate Registrar, asking how many Wills admitted to probate were photocopy Wills in the last few years. His reply[127] was:

Table 2

Manchester Group Year	Wills – Wills & Codicils Orders	Codicils Orders	Pages of a Will Orders	Wills-Wills & Codicils proved at Manchester	Lost originals as % of Wills proved
1994	57	1	None	16,342	0.35
1995	45	2	None	15,389	0.31
1996	74	None	None	16,315	0.45
1997	59	None	None	17,080	0.34
1998	61	None	None	17,054	0.36

126 Sweet & Maxwell's Probate Practice Manual by Christopher King and Amanda King-Jones on page B3/1.

127 See Appendix K

1999	68	1	None	16,910	0.41
2000	78	1	None	16,860	0.47
2001	95	1	None	16,668	0.58
2002	101	1	None	16,695	0.61
2003	125	None	None	16,967	0.74
2004	128	1	None	16,755	0.77
2005	151	2	1	17,019	0.9

151 photocopy Wills admitted to probate instead of the original Will may not seem like many, but the Law Society Gazette advertisements for 2004 and 2005 did not reveal a single advertisement placed by a Manchester firm of solicitors.

The author has had occasion to have had admitted to probate a photocopy Will and the grant of representation had on it that the Will admitted to probate was "a copy" and that the grant was "limited until the original Will or a more authentic copy thereof be proved", which is what *Tristram and Coote's Probate Practice* 29th edition on page 569 says should happen.

Just to get an idea of what was at stake when firms advertise in the Law Society Gazette the author took the first 16 missing Wills adverts for 2004 with enough details for a search at the Probate Registry and did an appropriate search.

Four of the sixteen results[128] stated that no record had been found, and for the others there wasn't a single photocopy Will admitted to probate.

It was obvious to the author that the 197 missing Wills advertisements in the Law Society Gazette and the 151 photocopy Wills admitted to probate in Manchester were the tip of a very large iceberg as far as missing Wills is concerned.

The author asked the Sheffield firms of solicitors that did Wills & Probate how many missing Wills they had come across in the last year, and defined a missing Will as one where more than £100.00 plus VAT had been spent on looking for it, even if it was eventually found. The average was just 1.25 per firm, with the lowest figure 0 and the

[128] See Appendix L

highest 5. Extrapolated to all 32 firms in Sheffield that do Wills & Probate that comes to 40 missing Wills in Sheffield alone in 2005.

Assuming that Sheffield is more or less typical of England as a whole, if Sheffield has a population of approximately 500,000 people and England has 45 million, then extrapolating Sheffield's figures for England gives approximately 3,600 missing Wills in 2005.

How much money is at stake with missing Wills? Taking the 12 positive results of the search at the probate registry gave an average net estate of £154,796.67.

The figures for the net estate on grants of representation are very often on the low side because: (i) assets are often found after a grant has been obtained, but the grant is not then amended; and
(ii) the figure is the net estate in the United Kingdom and does not include property held abroad.

However, even taking the figure of around £150,000.00 per missing Will, this gives an astonishing £540M as being the amount of money at stake in 2005.

In addition, there is always a cost in looking for a missing Will, (eg advertisement in the Law Society Gazette, letters to local firms, or whatever), and if only a photocopy is available then the procedure for getting it admitted to probate involves expenditure over and above that of admitting an original Will.

Obviously, to a large extent the figures are very speculative, but it does not affect the general principles involved. Wills are extremely important documents and it should not be a matter of conjecture (i) whether one was made at all, and (ii) if a Will was made, what is in the Will and where it is being kept.

There is a new system of deposit and/or registration of Wills, but the relevant provisions of the Administration of Justice Act 1982[129] are not yet in force, and, in the opinion of the author, should never come into force as currently drafted.

The research confirms that solicitors' firms regard the deposit of original Wills as a valuable source of future instructions to do the probate.

Demanding, as the 1982 Act does, that original Wills be deposited with the Principal Registry of the Family Division would immediately remove that source of work to solicitors' firms and also remove an important incentive to do Wills at a low price.

In March 2006 the author telephoned the Manchester firms[130] that do Wills & Probate to find out what their price was for doing a very simple Will for one person and/or a married

[129] Sections 23 to 25 inclusive of the Administration of Justice Act 1982. Section 23
(1) The following, namely –
(a) the Principal Registry of the Family Division of the High Court of Justice;
(b) (applies only to Scotland); and
(c) (applies only to Northern Ireland),
shall be registering authorities for the purposes of this section.

(2) Each registering authority shall provide and maintain safe and convenient depositaries for the custody of the wills of living persons.

(3) Any person may deposit his will in such a depository in accordance with regulations under section 25 below and on payment of the prescribed fee.

(4) It shall be the duty of a registering authority to register in accordance with regulations under section 25 below –
(a) any will deposited in a depository maintained by the authority; and …

According to the looseleaf work Butterworths Wills, Probate & Administration Service "The new system prescribed by the Administration of Justice Act 1982, sections 23-25 (not yet in force) provides not only for the deposit of Wills and the registration of Wills but also for the registration of Wills not deposited. In the latter respect the sections are intended to implement what they call the Registration Convention (the Convention on the Establishment of a Scheme of Registration of Wills, concluded at Basle on 16 May 1972).

In England and Wales the registering authority, charged with the tasks both of providing depositories and of registration, is the Principal Registry of the Family Division and the procedure is to be governed by regulations still to be made. The new system will subsume the old: Wills deposited under the old system are to be treated as deposited under the new, and regulations made under the old system are to have effect under the new."

[130] See Appendix M, which is a spreadsheet with the prices quoted by Manchester firms of solicitors for doing a simple Will for one person and for doing a simple Will for a married couple.

couple, in which they give everything to a surviving spouse, with a substitutionary gift to the children in equal shares, and with no Inheritance Tax implications involved.

The lowest price quoted was £52.88 inclusive of VAT and the highest price was £470.00, with the average price being £106.74 including VAT.

The lowest price for a married couple doing identical Wills was just £80.00, the highest was £587.50, and the average £166.50 inclusive of VAT.

Whilst a fee of £15.00 is currently charged by the Principal Registry of the Family Division, solicitors' firms do not charge for keeping (what is for them) a source of future instructions.

Although £15.00 is not a lot of money, it is something, and anything that increases the price of making a Will is going to put some people off making one or updating one that might desperately need updating.

Question 3 of the questionnaire asked who should pay the cost of registering a Will.

Three Sheffield firms said the testator/trix, two firms said the estate, and three firms responded that the question did not apply, (presumably because they did not want there to be any compulsory registration).

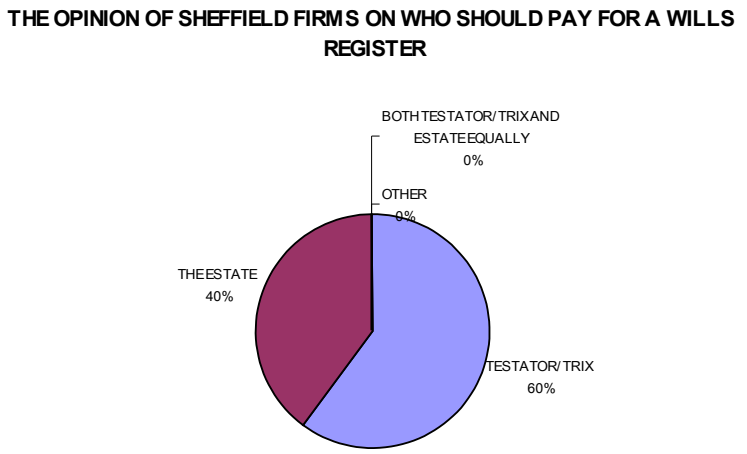

Figure 5

Twenty-one Manchester firms said that the testator/trix should pay, seven said that the estate should pay, and four firms said that the testator/trix and the estate should pay equally.

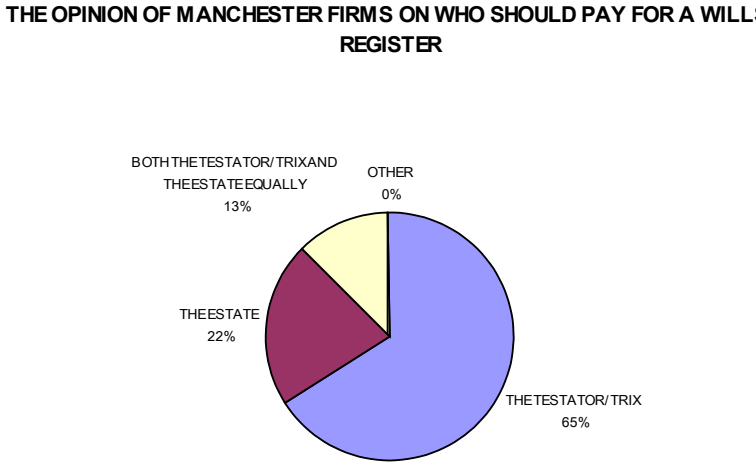

Figure 6

It is the opinion of the author that the firms that answered anything other than "the estate" made a mistake.

A Wills register will benefit every estate, because even if the deceased did not make a Will, having a certificate stating that no Will was ever registered reduces any doubts that there might be regarding who the real beneficiaries are supposed to be.

Furthermore, levying a search fee (and not a registration and deposit fee) spreads the cost across a much larger pool of people.

Very approximately around 700,000 people die every year in the UK, but only around one third die having made a Will.[131]

Searches of the Index Map at HM Land Registry are free because to charge a small fee is (almost) outweighed by the cost of the administration involved, but getting an office copy of the entries on the register costs £4.00 and that of the filed plan a further £4.00.

It is the author's view that the Probate Registry could administer a simple system of compulsory registration, and if a charge of, for example, £5.00 was to be made for each search that had to be carried out before any estate could be administered, that would provide an annual income of around £3.5m, which should be ample.

Question 2 of the missing Wills questionnaire asked if firms thought that there should be a system of compulsory registration of Wills.

Five Sheffield firms said "Yes", there should be a system of compulsory registration, whilst four said "No".

[131] *Textbook on Succession*, Andrew Borkowski, Oxford University Press, 2002, pages 3 & 4

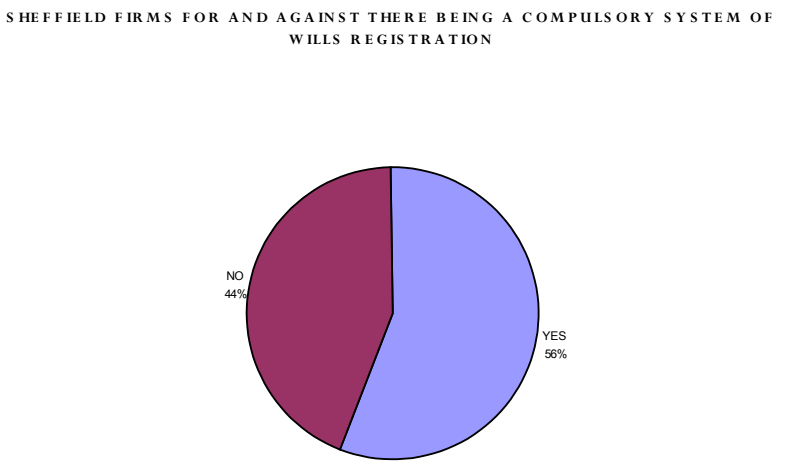

Figure 7

Twenty-two Manchester firms said "Yes" to compulsory registration, and just ten said "No".

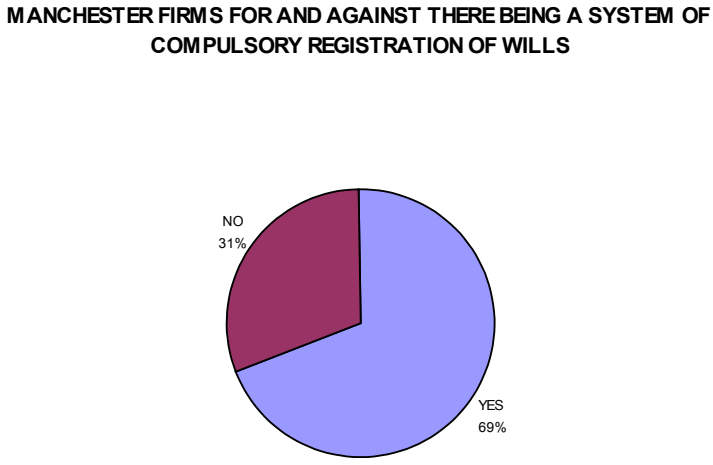

Figure 8

Question 4 of my missing wills questionnaire asked if firms thought that there should be a system of compulsory deposit of original wills.

Not a single firm in Sheffield thought that there should a system of compulsory deposit.

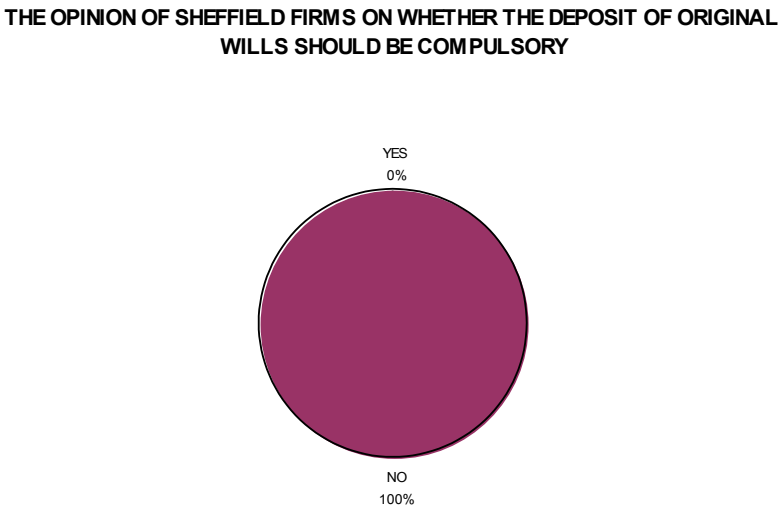

Figure 9

Eight Manchester firms said "Yes" to there being a system of compulsory deposit, whilst twenty-three firms said "No".

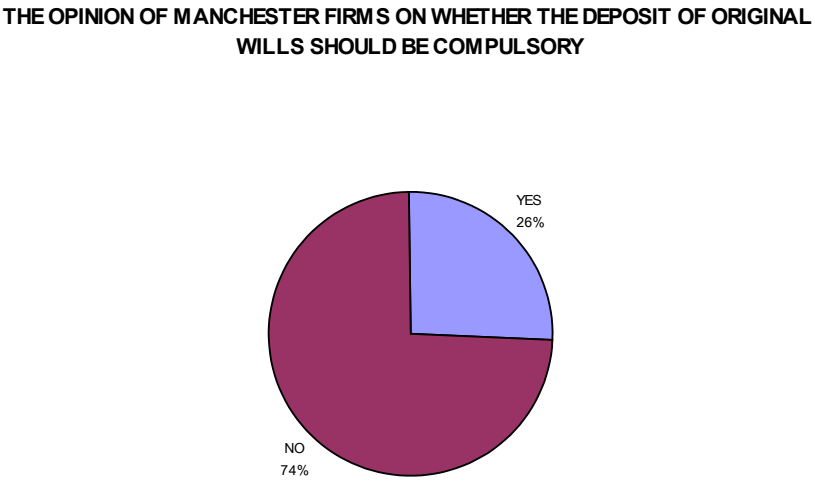

Figure 10

Question 7 asked where they would like to see original wills deposited if there was to be a system of compulsory deposit.

Eight of the Sheffield firms said with the firm/solicitor who made the will, and one firm suggested as an alternative "the bank".

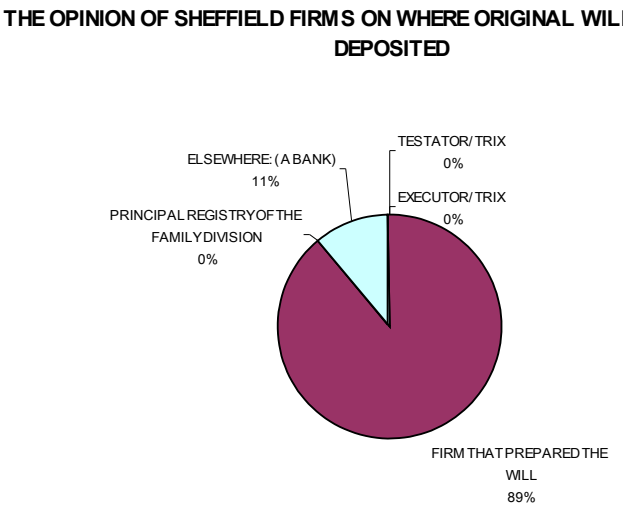

Figure 11

In Manchester the answer was radically different. Twelve firms said that original Wills should be deposited with the properly regulated firm or person who had made the Will. Seventeen firms said that it should be with the Principal Registry of the Family Division. Three firms said "elsewhere" and suggested that a special central depository should be set up.

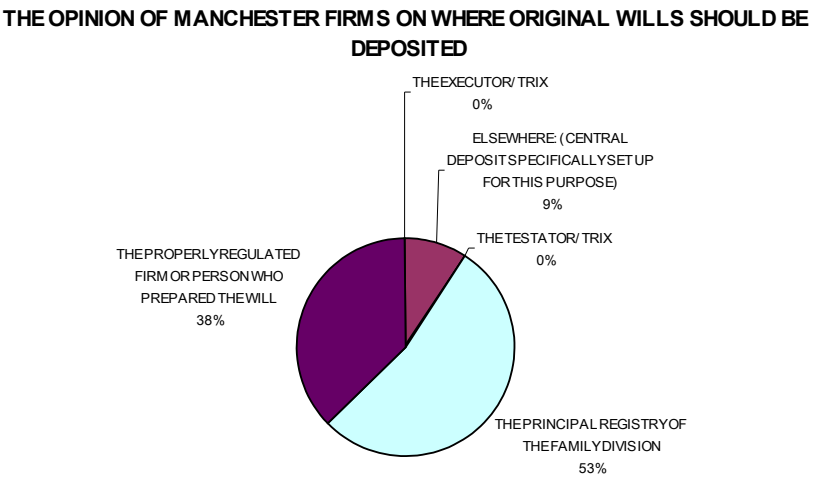

Figure 12

Question 1 of the Manchester questionnaire asked firms if they had often come across the phenomenon of missing Wills. Sixteen firms said "Yes" and fifteen firms said "No". Much might depend on what one means by "often", because one firm said that whilst they had not come across it "often", they had come across the phenomenon.

Conclusion

The author's views are as follows:

1. Original Wills do go missing, as evidenced by the fact that 151 photocopy Wills were admitted to probate at the Manchester District Probate Registry in 2005.

2. Sometimes a search is made for a Will, only for the solicitors and their clients to have to come to the conclusion that no Will was ever made (or maybe that an original Will was destroyed with the intention of revoking it), because of the 16 searches made against the names in 16 Law Society Gazette missing Wills advertisements for 2004 ten grants of administration[132] were made and only two grants of probate.

[132] On the older grants it used to say "Letters of Administration", where now it is just "Administration".

3. The amount of money at stake can sometimes be substantial, as evidenced by the figures for the net estates on the 12 positive search results, and, clearly, looking for a missing Will that sometimes exists and, more often than not, does not exist, has a cost.

4. It therefore follows that there should be a system of compulsory registration of Wills. At £5.00 or thereabouts per search, the resulting certificate has got to be excellent value for money.

5. There should be a system of compulsory deposit of original Wills.

The author would like the procedure to be as follows:

(1) Wills are extremely important documents and should be prepared by properly qualified and regulated personnel, including solicitors, notaries, barristers and legal executives, ie an "authorised" person, but not Consuls even when acting for their own nationals because they are diplomatic staff, not trained legal professionals.[133]

(2) "Do-it-yourself" Wills should cease being an option, except maybe in truly exceptional circumstances, and even then should be brought before an authorised person within a specified time-limit so that it can be checked for serious errors (which, regrettably, may or may not be correctable depending on the circumstances), and be registered. Failure to bring "do-it-yourself" Wills to a properly qualified and regulated person within a stipulated time-limit should result in the Will automatically losing its efficacy.

(3) The authorised person must check the ID of the testator/trix (eg a passport) at some stage in the proceedings in an effort to make sure that the person signing the Will really is the testator/trix.

[133] Section 28(7) of the Administration of Justice Act 1982 (if eventually brought into force) allows "diplomatic agents" and "consular officials" to do international wills for their own nationals. Section 10 of the Consular Relations Act 1968 currently allows them to administer oaths and do notarial acts in certain cases, including make Wills for their nationals.

(4) As a general rule, a draft Will must be sent to the testator/trix (in a language he or she can understand) at least two weeks before the scheduled signing to allow time for reflection. Exceptional circumstances, (eg a testator/trix who is clearly dying may not be able to wait two weeks, and/or is blind, and/or illiterate, and/or paralysed), will need to be factored into the regulations.

(5) The testator/trix should sign each and every (consecutively numbered) page of the Will first in the presence of two witnesses, and then the two witnesses should sign the Will in the presence of the testator/trix. Complications on a theme should be prohibited, except for testators/trices with severe disabilities, eg completely illiterate and/or blind.

(6) The authorised person must send to the Probate Registry (i) the full name of the testator/trix, and her maiden surname if a married woman, and any previous name(s) if there has been any change in the past for any reason, eg by deed poll, (ii) the date and place of birth of the testator/trix, (iii) when the Will was signed, and (iv) who the authorised person was who prepared the Will, in what capacity the authorised person acted (ie solicitor, notary or whatever), and his or her professional address. The time-limit for sending the details should be one month from the signing, with sanctions (eg a fine and eventually a striking off for repeated offences) on the authorised person in the event of avoidable failure to comply with the time-limit, plus an action in negligence for beneficiaries who suffer a loss thereby.

(7) The Probate Registry should enter the details reasonably expeditiously on its database, and in any event within one month of receiving the information. When the Probate Registry has entered the information on its database a letter must be sent to the authorised person confirming precisely what has been entered on the database.

(8) The testator/trix must be given a photocopy of the Will, and maybe also (optionally) the first named executor/trix.

(9) The original Will must be kept by the authorised person, and, when that authorised person ceases to practise for any reason, the original Will must be handed over to someone else who is also an authorised person and the Probate Registry must be informed so that it can enter on its database who has the original Will. The author is not in favour of depositing original Wills anywhere else, either at the Principal Registry of the Family Division or at a bank because of the difficulties in gaining access to the original Will during the lifetime of the testator/trix. Regulations will have to provide for exceptional circumstances, eg fire or flood destroying or damaging original Wills, the sudden death or the incapacity of the authorised person for any reason.[134]

(10) When a person dies and the probate has to be done, even in the case of small estates[135] nothing should be able to be done, (except maybe in an emergency), without an original death certificate being sent to the Probate Registry by the person handling the probate (together with a cheque for £5.00 payable to HMCS) and the Probate Registry issuing a note to that person giving all the information it has on its database, and that note being used wherever appropriate, eg in the case of a small payment under the 1965 Act, the note from the Probate Registry being necessarily shown to the financial institution together with the Will before the financial institution will pay out.

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[134] The [English] Notaries Practice Rules 2001 already provide a similar procedure. Rule 19.3 "In the case of a notarial act in the public form, the notary shall place an original of the act or a complete photographic copy of the same in a protocol which shall be preserved permanently by the notary."

Rule 21.1 "When a notary ceases to practise as such, then he, or failing him his continuing notarial partners or the person having possession or custody of the records maintained by him pursuant to rule 19, shall arrange for such records to be transferred:

21.1.1 to another notary in practice appointed by him or by his continuing notarial partners,

21.1.1 to another notary in practice appointed, with the approval of the Master, by the persons having possession or custody of the records, …"

[135] Administration of Estates (Small Payments) Act 1965 as amended.

(11) Where there is an application for a grant of representation to be issued, the grant must not be issued (unless there are some exceptional circumstances) until at least two months have passed[136] thereby allowing the registration process to be completed.

In essence, if UK inheritance tax is payable, no grant will be issued until it has been paid. The author has not encountered any significant defects in the system beyond this point.

Indeed, the procedure for doing the probate in England & Wales seems to the author to work better in England & Wales than in Spain. This is largely due to the existence of the concept of the trust and the job done by the personal representatives.

In England & Wales it is the personal representatives who implement all Wills by, for example, paying the creditors (insofar as possible) including HM Revenue & Customs, handing out the specific gifts in exchange for a signed receipt, and dealing with the residue.

The Spanish system of having the beneficiaries adjudicate on what they should be receiving, and then accepting the inheritance only if it suits them to accept it, does not work as well as the English system, particularly if the estate is insolvent and/or the beneficiaries are not all *sui juris* and/or do not get on with each other and/or are numerous and/or cannot be easily located.

In contrast, Spain has an effective system of registration and deposit of Wills. Given the importance of Wills as legal documents, this is a massive improvement on the English system of voluntary registration and deposit that is (probably) hardly known to exist, let alone get used.

It is the opinion of the author that:

136

Non-Contentious Probate Rules 1987 Rule 6(2) "Except with the leave of a district judge or registrar, no grant of probate or of administration with the Will annexed shall issue within seven days of the death of the deceased and no grant of administration shall issue within fourteen days thereof."

(i) the general drift of the Spanish system of compulsory registration and deposit of Wills is absolutely correct, but with the addition that (when the technology and technical expertise reaches the requisite level) the original Wills be scanned and an electronic version sent to the Probate Registry so that when it is sought to have an original Will admitted to probate it can be checked against the electronic version and so that if the original Will is lost or destroyed there is always a copy that can be admitted to probate;

(ii) the relevant provisions of the 1982 Administration of Justice Act regarding registration and deposit should never be brought into force, in particular because it would remove a valuable source of future instructions from the firms that prepared the Wills and is therefore highly likely to increase the cost of making a Will to clients in a manner that is completely unnecessary and avoidable; and

(iii) the testator's/trice's ID should be checked before the Will is signed, and what that ID was should be specifically stated in the Will.

INHERITANCE TAXES

Both the UK and Spain have inheritance taxes.

Spain

The principal relevant legislation is Law 29/1987, of 18 December. The abbreviation used for this tax is "ISD", which stands for Tax on Successions and Gifts.

With the exception of the Basque Country and Navarre, ISD[137] applies to the entire country, although the money collected from it goes to the Autonomous Communities.[138]

It isn't that the Basque Country and Navarre do not have an ISD, because they do, and although there are some differences to the ISD that applies nationally, they are relatively minor. The general principles are exactly the same as nationally.

The reason for ISD given in the preamble to Law 29/1987 is that the tax contributes to the redistribution of wealth. It also raises revenue for Spain's many regional governments.

Article 1 of Law 29/1987. "The Tax on Successions and Gifts, is by its nature direct and subjective, taxing the increases in wealth obtained for free by people, on the terms stipulated by this law."

Article 3-1 "The following is [potentially] taxable:
a) The acquisition of assets and rights by inheritance, legacy or any other succession title.
…
c) The receiving by the beneficiaries of life assurance contracts of sums [of money] when the person taking out the contract is different to the beneficiary, …"

[137] Article 2-1 of Law 29/1987 "The Tax on Successions and Gifts will be demanded throughout Spain, without prejudice to the tax regimes agreed with the Historic Territories of the Basque Country and Navarre, respectively, and with that stipulated in International Treaties and Conventions which have become law in this country."

[138] Article 2-2 of Law 29/1987 as amended by article 29 of Law 14/1996, of 30 December.

Article 3-2 makes it clear that ISD does not apply to limited liability companies in all their possible forms. They are covered by the Spanish equivalent of Corporation Tax.[139]

Article 5 provides that those who receive the assets are the people [potentially] liable to pay ISD.

In short, human beings who receive property, whether movable or immovable, are the ones who potentially have to pay ISD on what they have received.

Under Article 6 those who are habitually resident in Spain pay ISD on all assets received, whether in Spain or abroad.

"Habitually resident in Spain" means being in Spain more than 183 days a year.[140]

Under Article 7 those who are not habitually resident in Spain, but who acquire assets situated in Spain also have to pay ISD on such assets.

What is potentially going to be taxed? Under article 9(a) it is "the net value that each individual beneficiary acquires, being the real value[141] of the assets and rights reduced by such charges and debts that are deductible."

In the case of life assurance policies, under article 9(c) it is "the sums received by the beneficiary. …"

Article 15. "The household chattels form part of the estate and are valued at 3% of the [rest of] the estate, except when the people involved give it a higher value or can properly prove that they do not exist or that their value is below that would result from applying the previously mentioned percentage."

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139 Law 43/1995, otherwise known as IS or Tax on Companies.

140 Article 17 of the ISD Regulations, Royal Decree 1629/1991, of 8 November.

141 On the whole the "real value" is the "normal market value". *El Valor Real Tributario* or *The Real Tax Value*, Amancio L Plaza Vázquez, Aranzadi, 2000.

Once the net estate has been ascertained, the next step is to see if any statutory reductions apply, for example, for being the surviving spouse, disabled or whatever.

Article 20-1. "In the case of [potentially] taxable acquisitions, the amount that really is going to be taxed [by ISD] will be ascertained by applying the reductions stipulated by Law 21/2001, of 27 December, which regulates the new system of financing the Autonomous Communities and Cities with Autonomous Status, and which have been approved by the Autonomous Community. These reductions will apply in the following order: in the first instance, those of the State, and, thereafter, those of the Autonomous Community.

2. In acquisitions upon death, including life assurance policies, if the Autonomous Community has not regulated the issue of reductions referred to in the previous paragraph or the laws of the Autonomous Community do not apply to taxpayers, then the following reductions apply:
a) Those that apply to the following groups:
Group I: acquisitions by descendants and adopted [children] under the age of 21, 15,956.87 Euros, plus 3,990.72 Euros for each year under 21 that the taxpayer has, without the total reduction ever being more than 47,858.59 Euros.

Group II: acquisitions by descendants and adopted [children] aged 21 or over, [surviving] spouse, ancestors and adoptive parents, 15,956.87 Euros.

Group III: acquisitions by collateral relatives of second or third degree[142], ancestors, and descendants by marriage, 7,993.46 Euros.

Group IV: acquisitions by collaterals of the fourth degree[143], more distant relatives and those not related at all to the deceased, do not have a reduction.

[142] Article 918 of the [Spanish] Civil Code explains that a brother and sister of the deceased is two degrees, and aunts and uncles three degrees.
[143] ie first cousins.

In addition to the reduction that might apply due to the degree of relationship to the deceased, a reduction of 47,858.59 Euros is awarded to those people who are legally considered to be disabled, with a degree of disability of between 33% and 65% (inclusive), calculated in accordance with the scale referred to in article 148 of the Reformed Text of the General Law on Social Security, passed by Royal Legislative Decree 1/1994, of 20 June; the reduction will be 150,253.03 Euros for those persons who, in accordance with the aforementioned law, can prove that they have a degree of disability of over 65%.

b) Independently of the above reductions, a reduction of 100% up to a limit of €9,195.49 is applicable to the amounts received by beneficiaries of life assurance policies when they are the spouse, ancestor, descendant, adopter or adopted vis-à-vis the deceased. …

c) Where [the estate] … going to the spouse, descendants or adopted [children] of the deceased includes a privately owned enterprise, professional business or [some such similar concern] … in order to calculate the taxable amount of the inheritance, in addition to the above reductions, one of 95% is applied, provided the inheritance is kept for [at least] 10 years after the death of the deceased …[144]

The same percentage reduction, up to a limit of €122,606.47 for each taxpayer and with the same requirement of keeping the item as above, is applicable to acquisitions on death of the habitual dwelling of the deceased, provided the inheritors are the spouse, ascendants or descendants of the [deceased], or a collateral relative aged 65 or older who has lived with the deceased for [at least] two years before the deceased died. …"

Article 21 provides that each Autonomous Community can establish its own tax rates, but in default they apply the rates in the table of paragraph 2. The table was originally in pesetas and converted into Euros in 2001 to be as follows:

[144] A failure to keep the item for the minimum 10 years means that Spanish inheritance tax is payable, plus interest for late payment. Article 20.

Table 3

Taxable amount/ Up to [in] Euros	Amount/ Euros	Rest of taxable amount/ Up to [in] Euros	Rate applicable/ Percentage
0.00		7,993.46	7.65
7,993.46	611.50	7,987.45	8.50
15,980.91	1,290.43	7,987.45	9.35
23,968.36	2,037.26	7,987.45	10.20
31,955.81	2,851.98	7,987.45	11.05
39,943.26	3,734.59	7,987.46	11.90
47,930.72	4,685.10	7,987.45	12.75
55,918.17	5,703.50	7,987.45	13.60
63,905.62	6,789.79	7,987.45	14.45
71,893.07	7,943.98	7,987.45	15.30
79,880.52	9,166.06	39,877.15	16.15
119,757.67	15,606.22	39,877.16	18.70
159,634.83	23,063.25	79,754.30	21.25
239,389.13	40,011.04	159,388.41	25.50
398,777.54	80,655.08	398,777.54	29.75
797,555.08	199,291.40	Onwards	34.00

The above amounts are increased annually in line with inflation. Some autonomous communities have published their own tables, but the general principle remains the same; ie the more a beneficiary receives, the higher the marginal tax rate.

Once the taxpayer has determined the amount payable as per the above table, the next thing to apply (but only to beneficiaries habitually resident in Spain) is article 22; ie a multiplier calculated in accordance with a table. The multiplier is not applied to beneficiaries who are not habitually resident in Spain.

Article 22 provides that each autonomous community can establish its own table of multipliers, but in the absence of such a table, the following is applicable:

Table 4

Pre-existing wealth in Euros	Article 20 groups		
	I and II[145]	III[146]	IV[147]

[145] Spouse, descendants and ascendants, including those by adoption

[146]

From 0 to 402,678.11	1.0000	1.5882	2.0000
From more than 402,678.11 to 2,007,380.43	1.0500	1.6676	2.1000
From more than 2,007,380.43 to 4,020,770.98	1.1000	1.7471	2.2000
More than 4,020,770.98	1.2000	1.9059	2.4000

Although the multipliers do not vary, the amounts to which they are applied are increased in line with inflation each year.

Some Autonomous Communities have their own table of multipliers, but the basic principle remains the same; ie (i) the more wealthy a beneficiary already is when receiving an inheritance and (ii) the more distantly related they are to the deceased, the greater the multiplier applied to the amount calculated in accordance with the table in article 21.

The above can be more easily understood via examples.

1. The deceased leaves a net estate of 500,000 Euros to a surviving spouse, and that net estate does not include items like the habitual dwelling or family business which would attract a substantial reduction in the taxable amount.

A surviving spouse is entitled to a reduction of €15,956.87, leaving a taxable inheritance of €484,043.13.

To the first €398,777.54 the amount of €80,655.08 has to be paid.

On the remaining €85,265.59 the marginal rate is 29.75% = €25,366.51.

Therefore, applying the table in article 21 gives €106,021.59 as the amount of tax the surviving spouse would have to pay.

Collateral relatives of second or third degree, and ancestors and descendants by marriage

[147] Collateral relatives of the fourth degree, and more distant relatives, and beneficiaries completely unrelated to the deceased.

To that amount has to be applied the multiplier in the table of article 22. If the surviving spouse already has assets to the value of €402,678.11 or less, then the multiplier is 1.

If, however, the surviving spouse is already wealthy and has assets in excess of €4,020,770.98, the multiplier is 1.2 = €127,225.90 being the inheritance payable in this example.

2. If a friend inherits €500,000 there is no reduction in that sum subject to tax. ie half a million Euros is the amount subject to inheritance tax.

The amount of tax payable applying the table in article 21 is €80,655.08 on the first €398,777.54 and the rest is taxable at 29.75% = €30,113.68; giving a total of €110,768.76.

Assuming that the friend is already wealthy and has pre-existing assets amount to over €4,020,770.98 the multiplier is 2.4 giving €265,845.02 as the inheritance tax payable in this example.

In conclusion, there is a built-in incentive in the Spanish system for a deceased to distribute their estate as widely as possible to people who are closely related to the deceased and who are not already wealthy in their own right.

The author regards €10,000 minimum exempt as too low, especially at a time of high property prices, and this is a view shared by the autonomous community of Cantabria[148] which has a minimum exempt of €50,000 ie around £35,000 for surviving spouses and children of the deceased.

In general, lifetime gifts are taxed at the same rate as inheritances, but without there being the £10,000.00 minimum exempt.

[148] L Cantabria 7/2004 article 13

There are numerous exemptions to the general rule, (or "reliefs"), but in general they are directed towards making it economic for businesses to be handed down from an older generation to a younger generation, (the same as for gifts on death), presumably because not to have these exemptions would end up crippling the Spanish economy and hurting the employment prospects of millions of people.

Spanish charities and political parties are not people. Only people are subject to ISD[149] on the inter vivos or mortis causa gifts that they receive.

"Non-profit making organisations" (ie charities and political parties) do not (normally) pay tax on either inter vivos or mortis causa gifts.[150]

There is no small gifts exemption.

Under article 32 of the ISD those in charge of the Civil Registries must send to the tax authorities in the first fortnight of each month the names and addresses of the people who died in the previous month.

Under the same article 32 Notaries are also obliged to send to the tax authorities the details of any notarial act that they think might give rise to an increase in assets and the payment of ISD.

The procedure is for a beneficiary to accept their inheritance via an "escritura" (deed) signed by the beneficiary and the notary, in which the beneficiary declares what they are accepting and how much it is worth.

In the first instance, the ISD payable is calculated on how much the beneficiary declares that he or she is accepting. If the tax authorities disagree with the amount declared, they will issue a notification to the beneficiary telling him or her what they think still needs to

[149] Article 1 of Law 29/1987, of 18 December; otherwise known as ISD or Tax on Successions and Gifts.
[150] Article 48 onwards of Law 30/1994.

be paid, and if the beneficiary disagrees strongly enough a litigation case then develops in the administrative courts between the beneficiary and the tax authorities.

England and Wales

The relevant statute is the Inheritance Tax Act 1984, and UK inheritance tax is commonly referred to as IHT.

In effect what the Inheritance Tax Act 1984 (as amended) does is tax at 40% the net estate above £263,000.00 in 2004 or £275,000.00 in 2005 (or whatever happens to be the amount that can be transferred without paying any inheritance tax on it in the year that the deceased died).

There are a number of exceptions to the general rule. The principal ones are:

1. Potentially exempt transfers.

Introduced by the Finance Act 1986 which inserted a new section 3A into the IHTA 1984 it means that a lifetime transfer (of any amount) is not subject to IHT if the deceased lives at least 7 years after making the transfer.

2. Spouse exemption

Under section 18, in effect, if neither spouse is domiciled in the United Kingdom or if both spouses are domiciled in the United Kingdom there is no limit to the amount that can be transferred between spouses.

However, under section 18(2), (for no really good reason that the author can discern), if the transferor is domiciled in the United Kingdom, but the transferee is domiciled elsewhere, then the amount that can be transferred without counting towards a deceased's net estate for IHT purposes is limited to £55,000.00.

3. Charities

Under section 23 absolute gifts to charities are exempt.

4. Political parties

Under section 24 absolute gifts to political parties that either have two members elected to the House of Commons or one member and not less than 150,000 votes were given to candidates of that party are exempt.

5. Business property relief

Under section 105(1) of the IHTA 1984 as amended by section 184 of the Finance Act 1996 provides that 100% relief is available for the assets of or interest in a business.

Although dealt with under sections 115-124 of the IHTA 1984 there is 100% relief for agricultural property.

There are a number of other exemptions and reliefs, but the above is sufficient for a comparison to be made between English and Spanish inheritance taxes.

UK inheritance taxes are payable before a grant of representation is issued. The personal representatives fill in the appropriate form and send it, together with a cheque for the tax that they think is payable, to HM Revenue & Customs.

HM Revenue & Customs stamp a form D18, which is returned to the personal representatives, who then send it in to the Probate Registry together with the Oath for Executors and the marked Will (if there is a Will), or with just the Oath for Administrators if there is no valid Will.

Conclusion

The essential difference between Spanish and UK inheritance taxes is that in Spain inheritances taxes are payable by the person receiving the property solely on what he or

she receives (subject to exemptions and reliefs), whilst in England & Wales it is the personal representatives who pay 40% on the entire world-wide estate above the nil rate band, subject to exemptions and reliefs.

Both countries try and help surviving spouses, although (with the exception of section 18(2)) the UK's IHTA 1984 does the more complete job.

Both countries try and help family businesses to survive, although the UK's IHTA appears to do the more comprehensive job.

For the rest, the author thinks that those who are already very wealthy in their own right and/or who receive a lot should pay more than those who are relatively poor and/or who receive only very little.

Simply taxing a world-wide estate above the nil rate band at 40% regardless of the circumstances of the beneficiaries and how much they might each be receiving seems to the author to be potentially extremely harsh on those beneficiaries who are poor and/or might desperately need the money.

A testator/trix can make specific gifts free of IHT, but that merely passes the burden onto the residuary legatees.

The author's main criticism of the Spanish system is that the tax comes in at a very low level. A minimum exempt of just £10,000.00 for close relatives and no nil rate band for everyone else has got to lead to many a cash-flow problem for those receiving illiquid assets and who do not have much liquid assets of their own, although a start is being made by some Autonomous Communities to deal with the problem.