# Law's Families: Conceptions of the Family in Late Eighteenth Century English Law

Adam S. Hofri-Winogradow

## Why Late Eighteenth Century Family Property Law Has Been Neglected

Until 1875 the English temporal courts operated two separate jurisdictions – the common law and equity, famously described as 'a gloss on the law'.[1] As in many legal systems, family property law – the law regulating the transmission of property between family members – was one of the first areas of English law to attain a high level of sophistication. In the late eighteenth century it was still the most sophisticated branch of English law. That the existing legal historical literature about the period does not reflect this fact, concentrating mostly on those areas of law relevant to trade, such as contract, the law of bills and notes, insurance and partnership,[2] reflects the continuing baneful influence of nineteenth-century biases: research conducted using a conceptual framework assuming that 'the bourgeoisie' or 'trade' was 'rising' and that the landholding nobility was 'declining', or, what is worse, actually adopting on some level a belief-system according to which the exploitation of property for commercial or industrial purposes is 'good' or interesting and the possession and consumption of property for dynastic or other family reasons 'unproduc-

[1] The courts and the twin legal systems they operated were fused, nominally at least, by the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66); Supreme Court of Judicature Act 1875 (38 & 39 Vict c 77).

[2] The two leading works on late eighteenth century English law are Atiyah, Patrick S: The Rise and Fall of Freedom of Contract (Oxford 1979), and Oldham, James: The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century (Chapel Hill 1992), which also concentrates on Lord Mansfield's contributions to the law of trade.

tive' or bad, would tend to concentrate on those areas of the law of special relevance to trade or industry. And so the family property law of late eighteenth-century England has been curiously understudied.

Another cause for it having been understudied was the nineteenth century criticism and reform of the court of Chancery. Chancery was one of the four central English courts, the major though not the only one to operate the equity jurisdiction,[3] and increasingly in the eighteenth century the most important court for family property matters: the other three central courts, known as the common law courts, heard such matters too, but the remedies the common law had to offer, and its procedural framework, dependent on jury trial, were largely eclipsed, for complex family property suits, by Chancery's written bill procedure. However, in the nineteenth century Chancery fell victim to a massive reforming campaign, which mostly centered on the practical defects in the working of the court: the long delays experienced by suitors, the unnecessary expenses to which they were put by the court's many officers, and some features of Chancery procedure which seemed designed to multiply delays and fees.[4] The vilification necessary to drive professional opinion to reform the court has led to a very unflattering image of the late eighteenth century Chancery being imprinted on the collective memory of the English legal community. This image seems to have discouraged legal historians (with a few exceptions) from studying eighteenth-century, especially late eighteenth century, equity. It has also created some extremely long-lived path dependencies

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[3] The equity jurisdiction has also been operated by the court of the Exchequer. For the 'equity side of the Exchequer' see Macnair, Michael RT: The Court of Exchequer and Equity, in: Journal of Legal History (2001) P. 75; Bryson, William H: The Equity Side of the Exchequer (Cambridge 1975); Horwitz, Henry: Chancery's 'Younger Sister': The Court of Exchequer and Its Equity Jurisdiction, 1649-1841, in: Historical Research (1999), P. 160.

[4] For the nineteenth century criticism of the court of Chancery see, e.g., Parkes, Joseph: A History of the Court of Chancery (London 1828); and for the history of that criticism and the resulting reforms, Lobban, Michael: Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I, in: Law and History Review (2004) P. 389; id.: Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II, in: Law and History Review (2004) P. 565; and id.: "Old Wine in New Bottles": the Concept and Practice of Law Reform, c. 1780-1830, in: A. Burns, J. Innes (eds.), Rethinking the Age of Reform: Britain 1780-1850, (Cambridge 2003), P. 114.

in research: most of the handful of recent articles dealing with late eighteenth century equity have dealt with the practical working of the court, asking such questions as how long did the average Chancery bill spend in Chancery from its having been filed to either a Chancery decree or its disappearance from the records.[5] The substance of late eighteenth century equity, on the other hand, has been neglected.

One more reason for our neglect of late eighteenth century equity is that the leading equity judges of the time, Chancellors Thurlow and Loughborough, have received a signally unflattering treatment at the hands of posterity. Thurlow was a unique character, the great bully Chancellor: completely disdainful of proper social manners, especially disdainful of the hereditary aristocracy, he rose from humble beginnings to being granted a Peerage and appointed Lord Chancellor by the strength of his legal skills, imposing rhetorical delivery, and friendships. Uniquely, he exercised vast clerical patronage in the Church of England while living quite openly – indeed, famously - in sin with the pretty barmaid from Nando's Coffee House in London, close to the Temple, who bore him three daughters. His total lack of curtesy and disdain for conventional religion did not endar him to Victorian England. Very soon after his death, Victorian biographers started to write that Thurlow has been overestimated by his contemporaries, who were stunned into submission by his rhetorical tactics.[6]

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[5] See, along with the articles by Lobban in the last note, Horwitz, Henry and Polden, Patrick: Continuity or Change in the Court of Chancery in the Seventeenth and Eighteenth Centuries?, in: Journal of British Studies (1996), P. 24. For earlier eighteenth century equity see the important work of Michael Macnair and Henry Horwitz: Macnair, Michael RT: The Conceptual Basis of Trusts in the later 17th and Early 18th Centuries, in: Richard Helmholz and Reinhard Zimmermann, (eds.): Itinera Fiduciae: Trust and Treuhand in Historical Perspective, (Comparative Studies in Continental and Anglo-American Legal History, band 19) (Berlin 1998), P. 207-36; id.: The Law of Proof in Early Modern Equity (Berlin 1999); Horwitz, Henry: Testamentary Practice, Family Strategies, and the Last Phases of the Custom of London, 1660-1725, in: Law and History Review (1984), P. 223; id.: The Mess of the Middle Class Revisited, in: Continuity and Change (1987), P. 263; id.: Chancery Equity Records and Proceedings 1600-1800 (London 1995).

[6] The only modern biography of Thurlow was written for a popular audience: Gore-Browne, Robert: Chancellor Thurlow: The Life and Times of an Eighteenth-Century Lawyer (London 1953). See also Ditchfield, G.M.: Thurlow, Edward, first Baron Thurlow (1731–1806), in: Oxford Dictionary of National Biography (2004) [http://www.oxforddnb.com/view/article/27406, ac-

The sudden eclipse of Thurlow's considerable fame, on the cusp of the eighteenth and nineteenth centuries, seems to exemplify the sharp transformation which several historians of English society have noticed during the last two decades of the eighteenth century: the relatively open and secular 'masquerade society' of the eighteenth century crumbled suddenly into a rapidly rechristianised, conservative community valuing thrift, hard work and moral earnestness, reminiscent of Max Weber's ideal protestants.[7] The vilification of late eighteenth century equity by nineteenth century English lawyers can thus be seen as an example of the precipitate collapse of what social historian Dror Wahrman has called 'the short Eighteenth century' into pre-Victorian society.[8] The Lord Chancellor who succeeded Thurlow, Alexander Wedderburn, Lord Loughborough, was even more clearly a scion of the 'short eighteenth century': as a Scot growing up in Edinburgh in the 1740s and 50s he was the *wunderkind* of the Scottish Enlightenment, the quintessential expression of that 'short century'. In his twenties he was the editor of the first Edinburgh Review, in the second issue of which Adam Smith published his famous essay introducing Scot and English readers to Jean Jacques Rousseau. Having quarrelled with the Edinburgh judiciary, Wedderburn retraced the steps of his better-known compatriot, Lord Mansfield, and switched to the English bar. In a political career too complex to be more than sketchily reviewed here he established himself as the great tergiversator of English politics, switching his political allegiance no less than four times, the last of which brought him to the Chancellorship in 1793.[9]

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cessed 31 July 2006]. The key hostile Victorian biography of Thurlow is that by the Whig Chancellor, Lord Campbell: Campbell, John: Lives of the Lord Chancellors (London 1846), Vol. 5, P. 473-678. Foss's biographical essay was based on Campbell: Foss, Edward: The Judges of England (London 1864), Vol. 8, P. 374-85.

[7] The key source for this thesis is now Wahrman, Dror: The Making of the Modern Self (New Haven 2004); Wahrman studied with Lawrence Stone, who broached a similar thesis more briefly in his The Family, Sex, and Marriage in England 1500-1800 (New York 1977), P. 667-73.

[8] Wahrman, Making of the Modern Self.

[9] There is no modern full-length biography. The best recent source is Murdoch, Alexander: Wedderburn, Alexander, first earl of Rosslyn (1733–1805), in: Oxford Dictionary of National Biography, (2004) [http://www.oxforddnb.com/view/article/28954, accessed 31 July 2006]. Adam

Wedderburn, who was a well-esteemed advocate, parliamentary debater and government minister, suffered from a truly terrible posthumous reputation. The nineteenth century saw him, even more than his predecessor Thurlow, as a 'typical eighteenth century' figure with no morals and less loyalty: this bad reputation rubbed off on his judicial work, normally condemned along with Thurlow's as of insufficient depth. Loughborough's cultured habits also rubbed his hardworking Victorian and post-Victorian successors the wrong way: Sir William Holdsworth, the author of a 16-volume 20th century *History of English Law*, cited the complaint of earlier commentators that Loughborough was too often seen in the theatre and in good society – that is, he was having a good time when he should have been home with his caseload; no wonder that the delays in Chancery were piling up.[10]

## Methodology

Most of the work of Chancery was concerned with questions of inheritance law. This essay depends on the methodological premiss that through an intense engagement with the way Chancery tackled hundreds of concrete cases, one can formulate a model of the type of family relationships it saw as desireable. Formulating such a model is particularly challenging because most of what Chancery judges did was construing documents: wills and various pre- and post-nuptial agreements, known in lawyers' English as marriage settlements. Since document construction is at least ostensibly targeted at identifying the meaning the author of the document intended to convey, the norma-

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Smith's essay in the Edinburgh Review is now available in his Essays on Philosophical Subjects (Indianapolis 1982), P. 242.

[10] Lord Campbell's hostile biography of Wedderburn is in his Lives of the Lord Chancellors, Vol. 6, P. 1-366; Foss' shorter version is in his The Judges of England, Vol 8, P. 385-98. Another hostile nineteenth century treatment is that by Lecky, William EH: A History of England in the Eighteenth Century (London 1892), Vol. 4, P. 465. Holdsworth's hostile treatment is in Holdsworth, William S: A History of English Law (London 1938), Vol. 12, P. 569-76; (London 1952), Vol. 13, P. 578-80. The same critical narrative still recurred in the 1980s: Duman, Daniel: The Judicial Bench in England, 1727-1825: The Reshaping of a Professional Elite (London 1982), P. 89-90.

tive preferences of the interpreter are not easily extractable from the record of his efforts. Especially so in the case of Chancery judges, who were more often than not reticent about their normative preferences: they were never short of rhetorical strategies with which to hide them, the two most important of which were pretending that document construction was simply uncovering meanings authored by the creators of the documents construed, and pretending to blindly follow precedent.

Nevertheless, from the crabbed record of the equity proceedings of the late eighteenth century[11] I have tried to extract a model of family relationships the way equity wanted them to be. Equity dealt mostly with matters of family property, rather than with the social and emotional aspects of family relationships, but the latter are implicated in the former; especially so among social groups essentially dependent on inherited wealth, as many of those who litigated in the late eighteenth century Chancery were. While not being exclusively a court for the rich, Chancery suitors did tend to slant middle-class and up.[12] Among such social groups, inter-generational property arrangements tend to reflect the relative balance of power between the family members concerned; those family members entitled to enjoy the family property, as well as to dispose *of* it, can and often do use the power of the purse to make those family members dependent on them behave in ways they prefer.

My distinguishing between the enjoyment of property – what we call 'having' property – and the power to dispose of it points to a key characteristic of

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[11] The research is based on the full corpus of Chancery law reports included in the English Reports for the period between Thurlow's appointment in 1778 and Loughborough's dismissal in 1801, as well as manuscript reports of the same cases preserved in Lincoln's Inn library, London, as parts of the great manuscript collections of Sargeant Hill (hereinafter: "Ms Hill") and of Charles Abbot, later Lord Colchester (hereinafter: "Ms Abbot"). Many manuscript reports added much to the printed reports: information on stages of proceedings not reported in print, comments by both court and counsel, as well as references they cited, which have been omitted from the printed reports, and variant versions of speeches by both. The practice of law reporting, consisting of taking speeches down by ear, permitted of wide variations.

[12] Information as to the social make-up of Chancery suitors during the late eighteenth century was collected by Horwitz and Polden (n 5), P. 48; they found that less than a third of all Chancery litigants in 1785 were 'gentlemen and above', the lowest proportion of such litigants they found for any time between 1627 and 1819, and that nearly half were commercial men or artisans.

the way family property was held by the middle and higher classes in eighteenth century England. Family property and the powers to dispose of it in different ways were often distributed between different family members, so that, for example, a father might enjoy the right to receive the income on the family's land until he dies, at which point his son will be entitled to either the closest English equivalent of full ownership – the fee simple - or the form of tenure called 'fee tail' – the right to enjoy the income on the land yourself and to have it pass after you to your heirs in the male line, either to male descendants alone (under one form of this tenure) or to both male and female descendants (under another form). Another incident of the 'fee tail' was the power to turn it, by a technical procedure called 'common recovery', into a fee simple, the only tenure which included power to sell the land. The very complex and idiosyncratic pure theory of English property law facilitated a situation where the different powers over and entitlements to different parts of the family property tended to be distributed between several different family members. This decentralization of rights in family property contributed to the fairly non-tyrannical picture of family relationships which emerges from the late eighteenth century equity cases.

## The Duty of Parents to Provide for their Minor Children

This article shall focus on a central aspect of family relationships: the intergenerational balance of power. We shall discuss four major aspects of the balance of power Chancery saw as desirable.

1. Equity considered that parents should maintain and provide for the education of their minor children, even when other funds were made available specifically for this purpose by parties outside the parental relationship.[13] In the fairly common case in which a grandfather or other relative left, by his will, a fund for his grandchildren or other young relatives, payable on their majority, Chancery nearly always directed the fund to be paid into the Bank of

[13] *Andrews v Partington* (1789) 3 Bro CC 60, 29 ER 408; 2 Cox 223, 30 ER 103, followed in *Prescott v Long* (1795) 2 Ves Jun 690, 30 ER 845.

England immediately upon the deceased's estate having been administered, and invested in one or more of a very short list of securities which were actually secure: land mortgages and government securities, known to eighteenth century investors as 'the funds'. The interest accrued on this investment was accumulated, often re-invested in the same securities, and paid to the legatee along with the capital fund, on his majority.[14] This practice was adhered to even where the testator, in giving the legacy, expressly directed that the income accrued on it during the legatees' minority was to be expended on their maintenance, education or other needs. Chancery was thus ready to interfere in the dispositions testators and non-testamentary grantors made of their family property, and indeed change them, in order to stand on the principle that minors should be provided for by their parents. Chancery's interference was moderate: it did not change the actual distribution the testator or grantor made of his property; it did change, however, the time at which he intended the interest on the property to reach his chosen donee.

Chancery in the late eighteenth century actually moved from a position of total inflexibility on this issue, subject to the single exception of parents who did not have the means to provide for their children themselves, to a more flexible position, willing to consider all of the relevant circumstances: for example, a parent having several children, some of whom could expect large legacies from non-parental sources at their majorities and some could not, might under the later regime be allowed to use the interest on the former's legacies to maintain them, based on the consideration that should he be forced to maintain all of his children out of his income, not only will it be spread more thinly on maintaining a larger number of children, but the overall distribution of his property between his children would have been distorted in an undesirable direction, giving a larger part of the fund to those children ex-

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[14] *Green v Pigot* (1781) 1 Bro CC 103, 28 ER 1013; the rule was disapplied to legacies charged on land in *Gawler v Standerwicke* (1787-1788) 2 Cox 15, 30 ER 8; Ms Abbot vol VII 133a. For earlier stages in the development of the doctrine see *Phipps v Annesley* (1740) 2 Atk 57, 26 ER 432; *Palmer v Mason* (1737) 1 Atk 505, 26 ER 319; *Heath v Perry* (1744) 3 Atk 101, 26 ER 861; *Ferrand v Prentice* (1755) Amb 273, 27 ER 182; Dick 568, 21 ER 391. The rule received its statutory form in the Act for Repealing Certain Duties on Legacies… and for Granting Other Duties Thereon… 1796 (36 Geo 3 c 52) s 32.

pecting a gift *aliunde*, and thus perhaps contributing to the inequality of the overall provision made for each child.[15]

That even under the earlier, inflexible position, Chancery permitted impecunious parents to use the interest on legacies others gave to their children to maintain them during their minorities does not signify any tenderness in Chancery's attitude towards poor parents. Rather the opposite: insolvent fathers could lose guardianship of their children.[16] Chancery regarded maintaining your child financially as part and parcel of parenthood, at least amongst the ostensibly propertied: inability to so maintain was tantamount to a disqualification from parenthood.

By insisting that children be provided for by their parents, and that no part of any other fund which might be available for the same purpose be disbursed to the legatee until his majority, Chancery increased parents' power over their own children in the short term: children having an independent provision of their own might not have been easily restrained. Another effect of this policy, however, was to decrease the amount of free income at the father's disposal. This could be highly significant in ways which are not immediately obvious. The property of wealthy English families was often in this period settled under a sophisticated form of entail called 'strict settlement'. It was one of the fundamental quirks of early modern English property law that though on the face of the strict settlement, the family's property seemed to be settled and made inalienable for a very long time, the effective period for which land

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[15] For the exception to the earlier inflexible position, maintained by Lord Thurlow, see *Andrews* (n 13), *Hughes v Hughes* (1784) 1 Bro CC 387, 28 ER 1193; *Hill v Chapman* (1787) 2 Bro CC 231, 29 ER 129; Ms Abbot vol IV 111b, where Thurlow refused to award money out of the interest on a child's legacy for the time before the case was referred to the Master in Chancery, despite counsel for both parties consenting to such payment; and *Fendall v Nash* (1779) 5 Ves Jun 199, 31 ER 544, where the making of such an allowance out of the interest was especially critical, as the legatees' father was reduced to absolute indigence, and the legacies were only due to be paid after both parents died. Thurlow allowed maintenance out of the interest for the time since the father's financial failure. The later, more flexible position was gradually grasped at, then reached by Lord Loughborough in *Mundy v Earl Howe* (1793) 4 Bro CC 223, 29 ER 863; *Hoste v Pratt* (1798) 3 Ves Jun 730, 30 ER 1243; *Greenwell v Greenwell* (1800) 5 Ves Jun 194, 31 ER 541. Master of the Rolls Pepper Arden contributed to the development of the new doctrine in *Cartwright v Cartwright* (1794) Ms Abbot vol XII 32b.

[16] *Wilcox v Drake* (1784) Dick 631, 21 ER 416.

could be made inalienable was only one generation. Once the eldest son of the current *paterfamilias* reached his majority, the land could be 'disentailed' and sold. In order to resettle it and make it inalienable for another generation, the *paterfamilias* needed the cooperation of his son; and it was common to achieve this cooperation by way of some fairly substantial 'sweeteners' given by father to son during the sensitive period between the latter's majority and marriage.[17] Chancery policies which cut the amount of income at the free disposal of fathers could have a negative impact on their ability to provide their sons with such 'sweeteners', and thus to encourage them to resettle the family property. Fathers less able to resettle their family property were less able to ensure their family's continuing social standing and prestige, which were a function of how much property, especially land, it held. Chancery's insistence that fathers provide for their minor children themselves thus had the effect of diverting property from being invested in the long-term stability of the family line, to ensuring that the current generation enjoys sufficient authority over its children. Current relationships were preferred to long-term stability and security.

Chancery's insistence that minors be provided for by their parents had many additional consequences in equity doctrine. It meant, for example, that in cases where the parent controlling the family property – normally, but not invariably, the father – died before his children's majority, having left them sums of money by his will, to be paid to them on their majority, the court read a gift of the interest on those sums of money, to be used by the surviving parent or guardian for the children's maintenance, education and other needs during their minorities, into the deceased's parent will, even in cases where no such gift had expressly been made.[18]

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[17] Descriptions of the practical working of strict settlements appear in several basic works on English legal history. See, Baker John H: An Introduction to English Legal History, 4th edn. (London 2002), P. 294.

[18] *Crickett v Dolby* (1795) 3 Ves Jun 10, 30 ER 866; *Tyrrell v Tyrrell* (1798) 4 Ves Jun 1, 31 ER 1; *Brown v Casamajor* (1799) 4 Ves Jun 498, 31 ER 255, in all three of which Pepper Arden emphasized that legacies directed to be paid at a future time do not generally carry interest, unless the testator was the legatee's parent. He extended the exception to legacies for wives and grandchildren. In *Carey v Askew* (1786) 2 Bro CC 58, 29 ER 31; sub nom *Cary v Askew* 1 Cox 241, 29 ER 1147 Kenyon tried to establish a rule that even where a parent gave by will a sum less than the interest on a child's portion, for his maintenance during minority, the child could still demand –

## Maintaining Fathers' Power Over Their Children

2. Chancery saw as insufferable the rare situations in which children enjoyed larger rights in the family property than their fathers, putting the father at the wrong end of the power differential vis-a-vis his children. Such situations could occur, for example, where the family acquired its property through the maternal line, and settled it on the wife for life, and on the eldest son after her death. Chancery permitted a robust use of the parental 'power of restraint and correction' in order to correct such upside-down distributions of property and power: one way of correcting them was by resettling the property immediately on the eldest son's majority, increasing the father's rights in it. When some such sons asked Chancery to hold such resettlements void for undue parental influence, surprise and misrepresentation, Chancery refused to do so. It also refused to force fathers to account to their sons for the use they made of money raised by selling a part of the property in which the son had rights.[19]

## Making Children's Marriage Portions Conditional on Parental Consent to their Choice of Spouse

3. The court held that during the compulsory relationship of parents and children, which lasted until the latter's majority, parents should enjoy the power to veto marital partners they considered unsuitable. At majority, however, Chancery considered that formal legal restraint should be gone: adult children were to be legally free to marry whoever they wanted, however much social and family custom and expectations narrowed their practical margin of choice.

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and receive - the whole interest on the fund; but this extreme position, actively re-writing the will, was rejected by Arden in *Crickett*, as well as by Loughborough in *Mitchell v Bower* (1796) 3 Ves Jun 283, 30 ER 101, following Lord Hardwicke in *Hearle v Greenbank* (1749) 3 Atk 695, 26 ER 1200; 1 Ves Sen 298, 27 ER 1043. Where the sum bequeathed for maintenance during minority came not from the interest on the portion but from another fund, the child was not entitled to receive more than was bequeathed, either: *Wynch v Wynch* (1788) 1 Cox 433, 29 ER 1236.

[19] *Kinchant v Kinchant* (1784) 1 Bro CC 369, 28 ER 1183, Ms Hill vol 20 200.

This position, however, was only reached after a protracted struggle against one of the three rules of Roman law which survived in equity until the late eighteenth century. Equity was influenced by both its common law normative environment and the 'learned laws', those of the civil and canon laws. Eighteenth century lawyers believed that the rules of the latter systems have reached equity by way of the Anglican church courts, which applied a version of the pre-Council of Trent canon law.[20] Recent legal historical research has pointed to a direct influence of the canon and civil laws on equity, bypassing the church courts.[21] Be that as it may, the Roman law presence in eighteenth century equity was undergoing an advanced process of attrition. If reception means the incorporation of rules of foreign origin into a certain legal system, then the Roman rules applied by equity were never actually 'received' into it: rather they were applied as acknowledgedly foreign rules, with lawyers and judges brandishing civil law authorities at each other. That this practice continued for hundreds of years shows the isolationist common law 'ancient constitution' ideology to have had less of a stranglehold on seventeenth and eighteenth century English law than some narratives of English legal and constitutional history would have us assume.

By the late eighteenth century, the number of Roman law rules *actively applied* in equity was down to three. One of these three was the rule of the Lex Papia Poppaea, that clauses making gifts to a son or daughter on their marriage (called 'marriage portions' in England) conditional on the *paterfamilias*, or a surrogate, consenting to the marriage were void, so that the gift became absolute: the recepient could claim it whether his father consented to his marriage or not.[22] As is well-known, this rule was a result of the specific demographic situation obtaining in Rome after the civil war of the first century

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[20] A detailed rendering of this version of the history of equity was that by an important late eighteenth century lawyer and legal historian, Francis Hargrave: Juridical Arguments and Collections (London 1797), Vol. 1, P. 22, 46.

[21] Macnair, The Law of Proof in Early Modern Equity (n 5), P. 29-39, 289ff.

[22] D 35.1.62.2, 64, 72.4, 74, 79.4; Swinburne, Henry: A Treatise of Testaments and Last Wills, 5th edn., (London 1728), P. 265-67; and on Roman pro-nuptial policy generally, Treggiari, Susan: Roman Marriage (Oxford 1991), P. 60-80; Gardner, Jane F: Family and Familia in Roman Law and Life (Oxford 1998), P. 47-55.

B.C.E. It made for an internal contradiction in Roman law, for marriage itself was still conditional, for a person in *potestas*, on the consent of his *paterfamilias* (though a magistrate could supply a consent unreasonably withheld).[23] Until 1753, the rule made more sense as part of the English system than it did at its Roman origin, for marriage could be had in England by a simple agreement to marry: parental involvement was not required. This state of English law seems extraordinarily inappropriate for the society subject to it: 16th and 17th century English families were often rigidly hierarchical, with fathers choosing conjugal partners for their children. Perhaps the fact that the law made marriage without parental consent, and even against the parents' objections, possible, and even positively encouraged it by the adoption of the Roman rule holding 'consent clauses' void, in some ways encouraged or even caused the developement of forceful styles of parenting such as were then prevalent.[24]

The propertied classes campaigned for decades to have marriage made conditional on paternal consent, and in 1753 it was so made in Lord Hardwicke's Act;[25] this made the English rules on the subject identical to those of Roman law after the Lex Papia Poppaea, with one key difference: that all English children were, in a sense, automatically emancipated at majority, which was then at 21. Automatic emancipation deprived the English father from a key instrument of correction enjoyed by his Roman predecessor. That he was also denied the power to make marriage gifts conditional on his consenting to the marriage put him in a very weak position vis-a-vis his children. Equity responded to this problem by progressively encrusting the Roman rule holding

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[23] The Roman law is explained by Voet, Johannes: Commentarius ad Pandectas (Hague 1704) 23.2.7-10.

[24] On the 'forceful styles of parenting' then prevalent see Stone (n 7) P. 160-95; for parents' control of their children's choice of spouse see ibid., P. 180-193.

[25] An Act for the Better Preventing of Clandestine Marriages 1753 (26 Geo 2 c 33) s 11; see it discussed in two recent articles by Rebecca Probert: Probert, Rebecca: The Judicial Interpretation of Lord Hardwicke's Act of 1753, in: Journal of Legal History (2002), P. 129-151; id., The Impact of the Marriage Act of 1753: Was it Really "A Most Cruel Law for the Fair Sex"? Eighteenth-Century Studies (2005), P. 247-62.

consent clauses void with exceptions,[26] until at last Francis Hargrave, the most historically learned lawyer of the period who was also active in the courts, urged Thurlow in 1788 to abandon the Roman rule completely: he denied the validity of the common argument that equity should apply the same rules applied by the church courts, which had a concurrent jurisdiction with equity over legacy questions, for the sake of inter-jurisdictional harmony. Hargrave argued that since equity developed its concurrent jurisdiction over legacy questions, nobody resorted to the church courts any longer over them; and on the rare occasion when a legacy case came before them, the church courts, he said, actually follow temporal equity decisions.[27] Thurlow declined to adopt Hargrave's suggestion,[28] but Loughborough had very little patience for the application of non-English rules in the English system, and abolished the rule in 1796.[29] Hereinafter there were to be two separate legal regimes, each internally consistent: one for minor children, who had to obtain parental consent in order to marry, and marriage gifts to whom could be made conditional on parental consent to the child's choice of marriage partner; and the exact opposite for anyone over the age of majority. Some English donors tried to make marriage gifts to adults conditional on parental consent as well, but in these cases both Thurlow and Loughborough inflexibly struck down all of the conditions.[30]

Modern commentators may perhaps tend to see requirements for parental consent as tyrannically abridging the 'rights of the child'. Once one emerges from the metaphysical discussion of fundamental rights into the reality of family finances among the eighteenth century propertied classes, however, the

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[26] See discussion of such clauses in Staves, Susan: Resentment or Resignation? Dividing the Spoils among Daughters and Younger Sons, in: John Brewer and Susan Staves (eds.): Early Modern Conceptions of Property (London 1995), P. 205-6.

[27] *Scott v Tyler* (1788) 2 Bro CC 431, 29 ER 241; 2 Dick 712, 21 ER 448; (1791) Ms Abbot vol IV 76b; and see Hargrave's argument in full in his Juridical Arguments and Collections (n 20), Vol. 1, 22, 46.

[28] His judgment was fully reported by Dickens from Thurlow's own Manuscript notes: last note.

[29] *Stackpole v Beaumont* (1796) 3 Ves Jun 89, 30 ER 909.

[30] *Jones v the Earl of Suffolk* (1782) 1 Bro CC 528, 28 ER 1278; *Hutcheson v Hammond* (1790) 3 Bro CC 128, 29 ER 449; *Crommelin v Crommelin* (1796) 3 Ves Jun 227, 30 ER 982; *Mercer and Wife v Hall* (1793) 4 Bro CC 326, 29 ER 917; *Osborn v Brown* (1800) 5 Ves Jun 527, 31 ER 717.

picture changes quite significantly: from the point of view of the parents, marriage meant making a large gift to a person towards whom they had no obligations prior to that event. What the children's freely choosing a marriage partner meant was telling their parents who to give a large gift to. Under such circumstances it is less than shocking to give the payor, not even a right to choose the payee, but merely a right to veto truly impossible ones.

It is striking that it were the outsiders who immigrated into the English legal system who were especially impatient with the presence in it of nuclei of foreign material. Loughborough, who was educated in the Scottish system,[31] had far less superstitious respect for the rules of the civil law than any of the English equity lawyers who appeared before him. He also had a rationalising ideology in true Enlightenment style, not little reminiscent of Bentham, though as an establishment figure whose career was dependent on the existing structure of the legal field, he did not use the positions of power he held for sweeping legal reforms. He was irreverent enough, however, to reject the Roman rule against 'consent clauses', noting that its adoption in a Christian country was due to the unreasoning spirit of the 'unenlightened ages', which took what they saw in the books of the civil law as rules to guide them, not caring to reason whether these rules fit either England or its legal system.[32] That this was a typical outsider's attitude is shown by the further example of Jean Louis de Lolme, a Genevan who emigrated to England and made a career out of flattering the English for their excellent constitutional principles.[33] When, in a

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[31] For biographical material on Loughborough, see sources cited in n 9.

[32] *Stackpole v Beaumont* (n 29). Loughborough initiated other modest reforms; see, e.g., his 1794 General Order, allowing the separate creditors of each of two or more bankrupts to prove under a joint commission of bankruptcy issued out against the group without an exceptional petition to the Chancery; and requiring distinct accounts of the separate and joint estates, with separate and joint creditors having first call on those respective classes of estate and second call on any surplus of the other class of estate: General Order of the Lord Chancellor, reproduced in Christian, Edward: The Origin, Progress and Present Practice of the Bankrupt Law (London 1812-14), Vol. 2, P. 240-1. See discussion in Getzler, Joshua and Macnair. Michael: The Firm as an Entity before the Companies Acts, in: Paul Brand, Kevin Costello and W. N. Osborough (eds.): Adventures of the Law (Dublin 2005), P. 267, at text to fns 39-40.

[33] See De Lolme, Jean Louis: The Constitution of England; Or, an Account of the English Government (London, 1790).

rare venture into family property law, he criticised the famous will of a fellow Genevan emigré, Peter Thellusson, he also argued for a return to a mythically pure common law enshrined in Magna Carta, which gave every man his liberty and prohibited indivious schemes such as Thellusson's: Thellusson directed that most of his great property be not given to his children, but instead used for the purchase of land which shall be accumulated until the majority of his great-grandchildren. The law which permitted Thellusson to direct such a scheme was English equity, not a foreign norm such as the Roman rule against 'consent clauses', but the insistence on a pure English law is reminiscent of Loughborough's attitude, though far less knowledgable and more fanatical.[34]

## Accelerating the Transfer of Family Property to Younger Family Members

4. The final characteristic of the family relationship equity saw as ideal to be mentioned here was that while parents to adult children did not labour under a formal duty to provide for them, it was expected that, absent extreme misbehaviour, substantial sums of money – much larger than those expended on the maintenance of children during their minority – should be given by parents to their children as the latter attained majority, marriage and parenthood. While such a transfer was often necessary to obtain a prestigious enough marriage, it had also to be on a scale significant enough to render adult children substantially free of the type of control parents could wield by the power of the purse, and enable them to wield something of that power over their own young children. Chancery's ideal family was a family where members of each generation enjoyed significant power over a substantial part of the family

[34] De Lolme, Jean Louis: General Observations on the Power of Individuals to Prescribe, by Testamentary Dispositions, the Particular Future Uses to be Made of Their Property... (London 1798); see especially the second edition: id.: General Observations on Executory Devises… (London 1800). Making up for his non-comprehension with violence, De Lolme seems to suggest, following a Rousseauian vision of the just society, that the virtues of English law should best be restored by the abolition of equity. The *Thellusson* case is reported as *Thellusson v Woodford, Woodford v Thellusson* (1798-9) 4 Ves Jun 227, 31 ER 117.

property. Perhaps more than any other attribute of the family relationship Chancery preferred, this ideal diverged from the ideal held by many parents of the property-owning classes. As is perhaps to be expected in social groups subsisting primarily on inherited wealth, many fathers distributed the family property over which they had control so as to deprive their children from either enjoying substantial parts of it or having significant powers to dispose of it themselves. Most of the property, as well as the powers of disposing of it, were sometimes postponed so as to be enjoyed only by remote generations. Peter Thellusson's above-mentioned scheme was a good example.[35]

Some of the rules which equity developed to limit such schemes of dynastic ambition are well-known, at least to common lawyers: I need only mention the rule against perpetuities[36] and the rule against accumulations. The latter was first formulated in an Act passed in 1800 on the initiative of Loughborough, fresh from having to hold Peter Thellusson's scheme valid because English law had no norm under which he could hold it to be void.[37] But the range of rules which equity developed in order to manipulate family-authored property arrangements so that every generation of young adult family members enjoyed a certain amount of property and control went far beyond the rules developed specifically to block dynastic schemes. Equity held, for example, that where a mother was given a power to appoint a fund between her seven children 'in such manner as they should deserve' – that is, was given a total discretion - each of the children could assign and sell, before his mother

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[35] Text to n 34.

[36] The application of which in the late eighteenth century Chancery was quite rare; see *Robinson v Hardcastle* (1788) 2 TR 241, 100 ER 131 for Francis Buller's version of the rule; *Hay v Earl of Coventry* (1789) 3 TR 83, 100 ER 468; 86, 469 for Lord Kenyon's more permissive version; and *Routledge v Dorril* (1794) 2 Ves Jun 357, 30 ER 671 for the yet more permissive approach of Pepper Arden MR.

[37] For the rule against accumulations, see the *Thellusson* case (n 34). Loughborough's Act was An Act to Restrain All Trusts and Directions... Whereby the Profits or Produce of Real or Personal Estate Shall be Accumulated, and the Beneficial Enjoyment Thereof Postponed... 1800 (39 & 40 Geo 3 c 98). An exhaustive discussion of both the case and the Act is in Polden, Partick: Peter Thellusson's Will of 1797 and Its Consequences on Chancery Law (Lewiston, NY 2002). A case decided on the same year as *Thellusson*, where the court found itself able, unlike in *Thellusson*, to restrict a trust for accumulation without legislative reform, was Reeves v Brymer (1799) 4 Ves Jun 692, 31 ER 358; 698, 361.

executed her power, the possibility that he shall receive some property under that power.[38] So holding gave each child an asset independently of the mother's discretion, where the author of the family property arrangement clearly meant, by giving the mother such a wide discretion, to make the children dependent on her.

Even the rules of Roman law which survived in late eighteenth century equity were pressed into service in order to transfer family property to younger family members. The civil law held that 'debitum in præsenti solvendum in futuro': legacies which the testator made payable not on his death, but on a later date, vest on the death, not at the date set for payment.[39] This seemingly technical distinction received its practical import in cases where a legatee died after the testator's death, but before the time the testator set for the payment of his legacy. Holding the legacy to have vested on the testator's death meant that the entitlement descended to the legatee's heirs, while holding it not to have vested meant that the legacy lapsed, and the entitlement passed as the testator by his will directed it to pass in such a case, or, absent testamentary provisions for such a contingency, that it passed to the heirs of the testator under a partial intestacy. The application of this Roman rule thus often decided which of two groups of potential heirs took the legacy; is it therefore unsurprising that a great amount of complicated law developed on where exactly was the rule applicable.[40] The rule proved uniquely relevant to equity's

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[38] *Musprat v Gordon and Ux.* (1792) 1 Anst 34, 145 ER 791 (a case in the Court of Exchequer).

[39] D 36.2.21; Tituli ex Corpore Ulpiani 24.31; Stein, Peter (rev): Buckland, WW: A Text-Book of Roman Law, 3rd edn., (Cambridge 1966) P. 344-45. See this rule and its application by eighteenth century equity in Fonblanque, John: (ed) [Ballow?] A Treatise of Equity, 2nd edn., (London 1799), Vol 2, P. 202-4, 366-68.

[40] These complexities are too intricate to be unfolded here; I hope to enlarge on them in a subsequent publication. See *Dawson v Killet* (1781) 1 Bro CC 119, 28 ER 1023; *Barnes v Allen* (1782) 1 Bro CC 181, 28 ER 1069; Ms Hill vol 20 343; *Monkhouse v Holme* (1783) 1 Bro CC 298, 28 ER 1143, Ms Hill vol 18 61, 178; *Benyon v Maddison* (1786) 2 Bro CC 75, 29 ER 42; *Gawler* (n 14); *Doe d Wheedon v Lea* (1789) 3 TR 41, 100 ER 445; *Harrison v Naylor* (1790) 3 Bro CC 108, 29 ER 438; 2 Cox 247, 30 ER 115; *May v Wood* (1792) 3 Bro CC 471, 29 ER 649; Ms Abbot vol X 26b, 27b; *Pearce v Loman, Pearce v Taylor* (1796) 3 Ves Jun 135, 30 ER 934; *Mackell v Winter* (1796) 3 Ves Jun 236, 30 ER 987; (1797) 3 Ves Jun 536, 30 ER 1144; *Batsford v Kebbell* (1797) 3 Ves Jun 363, 30 ER 1055; *Booth v Booth* (1799) 4 Ves Jun 399, 31 ER 203; *Bolger v Mackell* (1800) 5 Ves Jun 509, 31 ER 707.

effort of manipulating family property arrangements so as to transfer property to the young: where a parent gave a legacy to a child payable at the age of, for example, 25, and the child died under that age leaving children of his own, applying the Roman rule meant that the legacy was payable to the children of the deceased child, at their majorities; disapplying it normally meant that the legacy was to be divided between the siblings of the deceased child. The application of the Roman rule thus made the legacy 'jump forward' a generation. Unsurprisingly, unlike the rule against 'consent clauses', the Roman 'early vesting rule' was not abolished in the late eighteenth century, though Loughborough, ever the most flexible of the Chancery judges of the period, was quick to disapply it where its application would have frustrated the policy goal of passing family property to younger members of the testator's family.[41]

## Conclusion

The ideal parents of late eighteenth century equity would provide for their children until their majorities, and transfer large sums of money to them soon after their majorities so that they could make their way in the world and enjoy some power over their own children. The ideal children of late eighteenth century equity did not exploit any power advantages they might fortuitiously have enjoyed over their parents; they gave of their own property to pull their parents out of debt, and did not marry without parental consent. Among the actual families whose affairs came before the court, most of the children seem to have measured up to the ideal fairly well. It were the parents who often came short: trying to embezzle gifts grandparents and others gave to their children, leaving property 3 or 4 generations ahead in the hope to found a dynasty, or dying while their children were still under 21 – what English law called 'infants' – leaving their children with no obvious source for maintenance during their minorities.

The conception of the family promoted by the eighteenth century court of Chancery seems equally far removed from a putative dynastic, aristocratic

[41] *Mackell v Winter* (last note).

model as from a 'laissez faire' model dedicated to the maximization of the current generation's dispository freedom. It is also – in its inter-generational dimension - a surprisingly modern model, differing from our current notions of proper inter-generational family dynamics in the single detail of requiring parental consent for marriage during minority. This revelation exposes the slow pace of social and legal change in the field of inter-generational family relations, falsifying the late-20th and early-21st century automatic assumption of continuous social and normative revolution. Many of our liberal notions of parental responsibility, if stripped of the language of rights, were already present in late eighteenth century equity.

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