

# *Parents, Children and Property in Late 18th-Century Chancery*

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**Abstract**—The late 18th-century court of Chancery established a balance between the respective interests of parents and their children in the family's property. The court required parents, especially fathers, to provide for the maintenance and education of their minor children themselves, even where money was made available for these purposes from a non-parental source. It prevented parents from intercepting gifts given to their children by third parties. It permitted parents, however, to make their children's entitlements to marriage portions conditional, for children marrying before majority, on the children's choice of spouse being consented to by a parent or parental surrogate. Chancery's overall intergenerational policy was notably anti-dynastic: it made sure that younger generations, specifically those just reaching adulthood, marriage and parenthood, were endowed with sufficient property to give them at least a measure of independence from their elders, and some power over their own children.

**Keywords:** trusts, equity, legal history, marriage, parental responsibility

## *1. Introduction*

In a recent groundbreaking article, Rebecca Probert used Chancery reports to show that while late 18th-century English fiction celebrated romantic love, and some historians of the period described the rise and legitimation of 'sentiments', 'feelings' and 'affections',<sup>1</sup> late 18th-century marriage, as practised by propertied families, often remained a calculated ploy of the

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<sup>1</sup> See, eg, Paul Langford, *A Polite and Commercial People: England 1727-1783* (OUP 1989) 463–71, 477–87, 498–505; Dror Wahrman, *The Making of the Modern Self* (Yale University Press 2004) 38–40, 185–88.

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inter-family status contest. She showed how the Clandestine Marriages Act of 1753<sup>2</sup> and clauses in wills and settlements making children's portions conditional on their marrying parentally approved persons did much to restrict young adults' choice of spouse to parentally approved candidates, despite the continuing possibility of marriage by banns, which was not invalidated by lack of parental consent.<sup>3</sup>

The Chancellors of the era and their court of Chancery played a major part in forcing the young propertied to choose spouses of whom their parents approved: Chancellor Hardwicke played a major part in the enactment of the 1753 Act,<sup>4</sup> and Chancery enforced individual parents' consent clauses with increasing enthusiasm as the century progressed.<sup>5</sup> A child's marriage, however, was merely one, admittedly important, point on the continuum of the parent-child relationship. Was the Chancery as facilitative of parental power when addressing other points on that continuum?

The interest of this question is underlined by the late 18th century Chancery's role as a key arbiter of families' property, and thus, indirectly, of propertied families' relationships. Having for centuries 'increasingly encroached on the jurisdiction of both common law and Ecclesiastical courts in matters of testamentary personalty,<sup>6</sup> as well as being the court of choice in trust cases,<sup>7</sup> the Chancery's influence on families' allocation of their property between their members was felt both at principal junctures of inter-generational wealth transmission, such as marriage and death, and at other times. Many Chancery suits concerning the allocation of family property were filed by persons entitled to such property under a will or settlement, asking that the court direct the executors or trustees to account for and pay over their entitlements. In other cases, those considering themselves entitled prayed that the court 'declare their rights' by confirming and construing wills, settlements and other deeds, resolving contradictions, and deciding which document governed which family assets. Other cases came before the court by executors and trustees filing suit to have the court direct them in establishing and executing the provisions of a will or trust, or, later, discharge them from their offices and indemnify them from liability for their execution thereof. Late 18th century minors neglected by their parents could petition the court to either order their parents to support

<sup>2</sup> An Act for the Better Preventing of Clandestine Marriages 1753 (26 Geo 2 c 33) s 11.

<sup>3</sup> Rebecca Probert, 'Control over Marriage in England and Wales, 1753-1823: The Clandestine Marriages Act of 1753 in Context' (2009) 27 L History Rev 413; see also Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (CUP 2009).

<sup>4</sup> David Lemmings, 'Marriage and the Law in the Eighteenth Century: Hardwicke's Marriage Act of 1753' (1996) 39 Historical J 339, 345-47.

<sup>5</sup> Probert, 'Control over Marriage' (n 3) 431-41, 450.

<sup>6</sup> Michael Chesterman, 'Family Settlements in Trust: Landowners and the Rising Bourgeoisie' in Gerry Rubin and David Sugarman (eds), *Law, Economy and Society* (Professional Books 1984) 148.

<sup>7</sup> Henry Horwitz and Patrick Polden, 'Continuity or Change in the Court of Chancery in the Seventeenth and Eighteenth Centuries?' (1996) 35 J British Studies 24, 39-41. See discussion of Chancery jurisdiction to hear 'suits of personal legacies' in John Fonblanque (ed) [Henry Ballou?], *A Treatise of Equity* (2nd edn, W Clarke & Son 1799) vol 2, 314-15.

them or appoint a guardian.<sup>8</sup> In deciding questions such as whether parents have to maintain their children themselves despite the existence of a non-parental gift given for this purpose, or whether children's entitlements could legitimately be diminished in order to pay their parents' debts, the Court defined the rights of both propertied parents and their children, as well as the responsibilities and obligations they owed each other.

The existing legal history literature on the court of Chancery in the later 18th century does not provide a full, balanced review of the court's approach to inter-generational family relationships. Part of the literature is concerned with Chancery procedure, particularly its defects, rather than with the substantive principles the court applied.<sup>9</sup> Scholars concerned with the principles the court applied to family property cases have tended to focus on specific doctrines.<sup>10</sup> Those concerned with the mutual approximation between social practice and the court's doctrine and normative standards have tended to focus on specific familial situations.<sup>11</sup> The well-developed literature on women's property rights does not directly focus on the distribution of entitlements to family property between generations.<sup>12</sup>

The present article proposes to advance this diverse literature in three ways. *First*, it provides a much fuller discussion than hitherto available of the late 18th-century Chancery's vision of the appropriate distribution of property, power and responsibility between the different generations of propertied families. Having attempted to address the court's approach to most if not all types of questions which came before it during the period under discussion and had an impact on the inter-generational distribution of entitlements and obligations in the family, I complement Probert's important study<sup>13</sup> by focusing

<sup>8</sup> John Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origins' (1994) 14 OJLS 159, 175.

<sup>9</sup> Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I' (2004) 22 L History Rev 389, 391–401 and "'Old Wine in New Bottles": the Concept and Practice of Law Reform, c. 1780–1830' in Arthur Burns and Joanna Innes (eds), *Rethinking the Age of Reform: Britain 1780–1850* (CUP 2003); Horwitz and Polden (n 7); Henry Horwitz, *A Guide to Chancery Equity Records and Proceedings 1600–1800* (2nd edn, PRO 1998).

<sup>10</sup> For works focusing on specific doctrines see, eg, Michael Lobban, 'Contractual Fraud in Law and Equity, c1750–c1850' (1997) 17 OJLS 451 (focusing on the law of contractual fraud); Michael Macnair, 'Equity and Volunteers' (1988) 8 LS 172 (describing the court's approach to covenants for volunteers over three centuries); Patrick Polden, *Peter Thellusson's Will of 1797 and Its Consequences on Chancery Law* (E Mellon Press 2002) (focusing on the *Thellusson* case and on perpetuities and accumulations doctrine); Seymour (n 8) (describing the evolution of the court's approach, since 1660, to its *parens patriae* and wardship powers).

<sup>11</sup> See, principally, Probert's many publications addressing the freedom to marry in the 18th century, including the two cited in n 3 as well as 'The Judicial Interpretation of Lord Hardwicke's Act of 1753' (2002) 23 J Legal History 129 and 'The Impact of the Marriage Act of 1753: Was it Really "A Most Cruel Law for the Fair Sex?"' (2005) 38 Eighteenth-Century Studies 247. Two articles which attempted a fuller picture of Chancery law and policy on inter-generational questions are Susan Staves, 'Resentment or Resignation? Dividing the Spoils among Daughters and Younger Sons' in John Brewer and Susan Staves (eds), *Early Modern Conceptions of Property* (Routledge 1995) 194, focusing on non-heir children, and Alain Pottage, 'Proprietary Strategies: the Legal Fabric of Aristocratic Settlements' (1998) 61 Modern Law Review 162. Compared with the present article, both cover a much longer period in less depth, drawing a far less complete picture of the court's balancing of the interests of family members of different generations at any given time.

<sup>12</sup> See, eg, Susan Staves, *Married Women's Separate Property in England, 1660–1833* (Harvard University Press 1990); Amy Louise Erickson, *Women and Property in Early Modern England* (Routledge 1993).

<sup>13</sup> Probert, 'Control over Marriage' (n 3).

on *both* the Court's support for parental power, on which she focused, and its enforcement of parental responsibility. I show that the late 18th-century court of Chancery established a balance between the interests of propertied parents and their children. Even as the court was buttressing parental power by enforcing consent clauses, it demanded parental expense and sacrifice: it required parents, especially fathers, to themselves provide for the maintenance and education of their minor children, even where money was made available for these purposes from a non-parental source. It prevented parents from intercepting gifts given to their children by third parties. It established a systematic anti-dynastic policy, formulating rules and construing documents so as to transfer sufficient family property to each generation of young adults in order to give them at least a measure of independence from their elders, and some power over their own children. Chancery drew an unstable line between parental authority and filial entitlement, parental obligation and filial obedience.

I obtained this more comprehensive portrait of the Chancery vision of appropriate inter-generational relations through a close reading and analysis of published and unpublished Chancery reports for the years 1778–1801. Most of the reports analysed are concerned with technical questions of equity, and do not include any explicit discussion of what the judges might have seen as proper parental or filial behaviour. Still, a careful collation and analysis of the decisions, in light of the factual circumstances of each case, brings to light an often implicit vision of correct inter-generational relations. It is that vision that I try to expose in this article.

The article's *second* contribution is in complementing discussions of parent–child relations in 18th-century propertied society, and of the views members of that society held on the appropriate such relations, found in the social history, economic history and cultural history literatures. The history of English families has been a field riven with dissent.<sup>14</sup> Some historians, such as Lawrence Stone and Randolph Trumbach, described the 18th century as having seen the English family transformed from an essentially authoritarian organization to a grouping bound by love and affection.<sup>15</sup> Others, such as Alan Macfarlane and Linda Pollock, found that English families having been characterized by loving, affectionate relationships, including between members of different generations, since the Middle Ages, the 18th century represented less of a turning point.<sup>16</sup> A reader of both sides to this celebrated debate

<sup>14</sup> For a description of the field, see Keith Wrightson, 'The Family in Early Modern England: Continuity and Change' in Stephen Taylor and others (eds), *Hanoverian Britain and Empire: Essays in Memory of Philip Lawson* (Boydell Press 1998).

<sup>15</sup> Lawrence Stone, *The Family, Sex, and Marriage in England 1500-1800* (Harper & Row 1977) ch 5 and 667–80; Randolph Trumbach, *The Rise of the Egalitarian Family* (Academic Press 1978); for a similar view, see Daniel Quinlan and Jean A. Shackelford, 'Economy and English Families, 1500-1850' (1994) 24 *J Interdisciplinary History* 431, 449.

<sup>16</sup> Alan Macfarlane, *Marriage and Love in England: Modes of Reproduction, 1300-1840* (Basil Blackwell 1986); Linda Pollock, *Forgotten Children: Parent-Child Relations from 1500-1900* (CUP 1983); Eileen Spring, *Law, Land, & Family: Aristocratic Inheritance in England, 1300-1800* (University of North Carolina Press 1993) 179–86.

emerges with a picture of late 18th-century English families of the middle and upper classes as characterized by a balance between parental authority, filial obedience, and parental responsibility, giving and love. This article innovates in showing how the court of Chancery advocated, and helped police, a similarly balanced model of inter-generational family relations. The court's model made a fairly close fit with that practised by the social groups the affairs of which it regulated.

*Finally*, the article addresses two questions which recur in historical studies of equity, whether focused on this or other periods. One is the question of equity having served as a conduit through which civil law rules flowed into English law. I offer substantial evidence in support of the view that equity did indeed fulfill this role: civil law rules were incorporated in equity, sometimes to dramatic effect.<sup>17</sup> The other question is that of equity's commitment to the doctrine of precedent. I show that commitment to have been, during the late 18th century, substantial though not absolute.

The article is structured as follows. In Section 2, I show how Chancery insisted on parents' duty to provide for their children. Depriving both parents and children from access, during the latter's minority, to entitlements which their parents did not provide both enforced that duty and increased parents' power over their children, at least in the short term. Chancery also sought to limit parents in disposing of the lion's share of their property past their children to generations further down the line. It insisted that parents transfer significant funds to their children, particularly as the latter were themselves reaching adulthood, marriage and parenthood. Section 3 complements Section 2 by addressing the extent of parental authority Chancery permitted. Within certain broad limits, Chancery was supportive of parental power and control, and redressed them when impaired. The court held, for example, that during the compulsory relationship of parents and children, which lasted until the latter's majority, parents should enjoy the effective power to veto marital partners they considered unsuitable, by making their children's marriage portions conditional on parental consent to their choice of spouse. Section 3 also points out that the court's late-century recognition of such consent clauses as valid, so long as imposed on minor children, was contemporary with the enhancement of English parents' authority over their children observed by several distinguished historians of the family. The court's model of appropriate inter-generational relations changed along with, and in a similar direction as, the model practised by the society it policed. Section 4 draws out policy rationales from the cases discussed in Sections 2 and 3, points out how the policies discussed in each fit together, discusses how the court modified its balance of parental authority and

<sup>17</sup> For a similar view, see Richard Helmholz, 'The English Law of Wills and the *ius commune*, 1450-1650' in Lloyd Bonfield (ed), *Marriage, Property and Succession* (Duncker & Humblot 1992) 309; for the opposite view, David Ibbetson, *Common Law and Ius Commune* (Selden Society 2001) 19-20.

responsibility as the century was coming to an end and emphasizes the article's contributions to the literature.

## 2. Parents' Duty to Provide for their Children

### A. The Unexcludability of Parental Responsibility

#### (i) *Period to Thurlow: strict unexcludability*

Many 18th-century gifts of property to minors were given so as to only be payable on majority. How was the donee to be maintained until that time? Sometimes provision for maintenance during minority was made in the same instrument where the main gift was given, and from the same source. For instance, in the 1777 marriage articles of the Duke and Duchess of Chandos, a 1000-year term was limited on some of the Duke's estates, in trust to raise portions for the younger children of the marriage, payable at their majorities, as well as in trust to raise maintenance, not exceeding interest on the portion at 4%, payable to the younger children until their portions shall be payable.<sup>18</sup>

Non-parental donors limiting such trusts for the maintenance of their donees during minority, or otherwise providing for them during that period, ran, however, against Chancery's clear position that parents, and not any non-parental donors, should provide for the maintenance of their minor children.<sup>19</sup> One consequence of this position was that settlements made by non-parental donors, such as grandparents, not making any provision for maintenance during the children's minority, were held good;<sup>20</sup> and that so were non-parental settlements which did not provide for raising portions at all. As Lord Macclesfield put it in 1718:

As to the objection, that the settlement did not provide a maintenance until the portion was payable, there was no reason that equity should supply it, any more than that it should supply the want of a portion, if none had been provided; but this might

<sup>18</sup> *Duchess of Chandos v Lady Brydges* (1795) 7 Brown PC 505, 506; 3 ER 328, 329. Another instrument making similar provision for maintenance during minority was the Duke of Leeds' will, discussed in *Osborne v Duke of Leeds* (1800) 5 Ves 369, 31 ER 634. Donors who gave certain assets to minors, payable on majority, could also give the income to be accrued on these assets until that time to the donees' father, to maintain his children thereout during their minorities, as in the will considered in *Congreve v Congreve* (1781) 1 Bro CC 530, 28 ER 1280.

<sup>19</sup> A position which may have developed out of the Roman position that fathers had to support their children, unless the latter had sufficient property of their own (D.25.3.5), by way of the Canon law and the ecclesiastical law of the province of Canterbury, which enforced fathers' duty to support their children during their minorities by modifying parental allocations during probate proceedings: Richard Helmholz, 'Legitim in English Legal History' in *Canon Law and the Law of England* (The Hambledon Press 1987) 257–58; Richard Helmholz, 'Support Orders, Church Courts, and the Rule of *Filius Nullius*: a Reassessment of the Common Law' (1977) 63 *Virginia L Rev* 431, 431–36.

<sup>20</sup> Some such donors expressly directed that the donees' father maintain and educate them during their minorities out of his own resources, and not use any part of the gift for those purposes: *Perry v Phelps*, *Perry v Smith* (1798) 4 Ves 108, 109; 31 ER 56, 57.

be industriously omitted by the settlement, as intending to leave the child to depend upon the mother, who, by the law of the land, and of nature, was bound to provide for it.<sup>21</sup>

Chancery's insistence that providing for the children was a matter for the parents guided many of its decisions. So Lord Thurlow emphasized in one case that a father, when applying to Chancery to receive a legacy bequeathed to his late wife (which like all of the wife's personalty was his at law), had to propose to the Master a financial settlement to be made on the children of the marriage as a condition to the legacy being paid over.<sup>22</sup> Insolvent fathers could stand to lose guardianship of their children.<sup>23</sup> Chancery regarded maintaining your child as part and parcel of parenthood, at least among the ostensibly propertied: inability to so maintain was seen as tantamount to a disqualification from parenthood.<sup>24</sup>

In its insistence on parents' duty to provide for their minor children, Chancery went beyond approving settlements by non-parental donors where no provision was made for maintenance during minority: even where such provision was in fact made, Chancery insisted on the parents leaving that provision unused, and maintaining and educating their children themselves. The fund which the non-parental donor directed to be spent on the minor children's maintenance and education, most often the interest earned on the portion between the donor's death and the donee's majority, was instead to be accumulated during that time, and the accumulated sum paid to the donee on his majority, along with the capital of his portion.

The conditions under which Chancery was willing to let the interest on non-parental portions, where specifically given as maintenance during the donee's minority, to be used for this purpose rather than accumulated, were in *Andrews v Partington* analogized to equity's role *vis-à-vis* the common law: much as equity only sprang into action where the common law did not offer an adequate remedy, so the interest on non-parental portions was only permitted to be used for the maintenance of the portioned during their minority where the parents were so impecunious as to be truly unable to maintain their children.<sup>25</sup>

<sup>21</sup> *Butler v Duncomb* (1718) 1 P Wms 448, 454; 24 ER 466, 468.

<sup>22</sup> *Rove v Jackson* (1783) Dick 604, 21 ER 406.

<sup>23</sup> *Wilcox v Drake* (1784) Dick 631, 21 ER 416.

<sup>24</sup> Other causes could also lead to such disqualification. Outlaw, runaway and violent fathers were restrained from controlling their children, too: *Creuze v Hunter* (1790) 2 Cox 242, 30 ER 113; also reported in manuscript reports by Charles Abbot (1st Baron Colchester), now at Lincoln's Inn Library, there catalogued as Misc 102-32 (hereinafter: MS Abbot; Misc 106 is 'vol P' of the reports series) vol V 159b; *Ex Parte Warner* (1792) 4 Bro CC 101, 29 ER 799; Dick 779, 21 ER 473; MS Abbot vol X 160a. Generally, Chancery saw paternal authority as dependent on the father's leading a moral life, and providing for one's children as part of such a life. Spendthrift fathers were also seen as immoral, a view which could make Chancery advocate the transfer of control over a family estate from such a father to his son: *Myddleton v Lord Kenyon* (1794) 2 Ves 391, 30 ER 689.

<sup>25</sup> *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 690, 30 ER 845. In *Pulsford v Hunter*; *Jennings v Hunter* (1792) 3 Bro CC 416, 29 ER 618; MS Abbot vol X 46b the policy underlying equity's refusal to have the interest on legacies, out of which the trustees were expressly directed to provide for the legatees' maintenance and education, paid out, was frustrated by the testator giving any interest not so used to the same legatees' parents. Another situation where Chancery

Maintaining the children was seen as the father's exclusive duty: they could be maintained from alternative sources only where the father was either absent or financially unable to maintain his children. This policy obtained whether the provision a non-parental donor made for the children's maintenance during minority was at trustees' (or the parents') discretion, or absolute. Even where the Master reported that a father was unable to maintain his children, maintenance was to be provided out of the fund dedicated to that purpose by a non-parental donor only from the date of the Master's report.<sup>26</sup> An underlying rationale of this doctrine was that a portion is a gift to the child, not to his father, and so no part of it, including the interest, should be paid to the latter; nor was the father (effectively) to be paid for maintaining his child during any past period.

Chancery tried to counter the danger of parents interfering with gifts others gave their minor children in several ways.<sup>27</sup> Some of the most important were procedural. One such was the rule that legacies for infants payable at a future time, often majority, were (unless charged on land), even if contingent, to be paid by the deceased's personal representative, as soon as may be, into the Bank of England in the name of the accountant general, to be invested by him in 3% consolidated annuities upon the trusts of the will. This rule, effectively turning the infant legatee into the testamentary equivalent of a creditor enjoying a fixed security, has gradually developed through the 18th century, was strongly asserted by Thurlow in 1781 and enacted in statutory form in 1796.<sup>28</sup> No part of the income accrued between investment and payment could

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permitted the interest on non-parental gifts to be used for maintaining the donees during their minorities was where their father had died, and their mother remarried. Under such circumstances, the court protected the stepfather's reliance interest in enjoying his wife's fortune, reasoning that her children of her former marriage were better maintained from the fund their grandfather had expressly bequeathed for that purpose than by 'robbing the second husband who is entitled to all his wife's property': *Billingsley v Crichton* (1783) 1 Bro CC 268, 28 ER 1121, also reported in manuscript reports by George Hill, now at Lincoln's Inn Library, catalogued as Hill MSS 1-36 (hereinafter: MS Hill) vol 18, 136 (quote in manuscript report only, 137).

<sup>26</sup> *Hughes v Hughes* (1784) 1 Bro CC 387, 28 ER 1193: the father's need for an allowance out of the non-parental fund is explained by the donor, a grandfather, directing that the capital of his grandchildren's portions only be distributed to them when the youngest grandchild attains his majority, by which time the older grandchildren might themselves be grandparents; see factual detail in *Hughes v Hughes* (1792) 3 Bro CC 434, 29 ER 628, a hearing on whether posthumous grandchildren were to be included. See further, *Andrews* (n 25); *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 to pay for the child's needs during the time before the case was referred to the Master, despite counsel for both parties consenting to such payment. In *Fendall v Nash* (1779) 5 Ves 199, 31 ER 544 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.

<sup>27</sup> The means taken by Roman and English ecclesiastical law to achieve the same purpose are discussed in Richard Helmholz, 'The Roman Law of Guardianship in England, 1300-1600' (1978) 52 *Tulane L Rev* 223. See a rescript of Severus to this purpose: D.35.1.92.

<sup>28</sup> The 1781 decision was *Green v Pigot* (1781) 1 Bro CC 103, 28 ER 1013. The rule was disappplied 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 *Horrell v Waldron* (1681) 1 Vern 26, 23 ER 281; 1 Eq Ca Abr 235, 21 ER 1014; *Phippis 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. It 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.

be paid to anyone but the legatee, even where the testator did not give the legatee any income which might accrue on the fund until the time set for its payment, or where he gave less income than did actually accrue.<sup>29</sup>

Further, payment of a child's legacy to his father was bad, unless the legatee expressly consented. Absent such consent, it was bad, even if the child was of age when payment was made to his father, knew of the payment, and did not remonstrate. The personal representative of the donor had to pay the legacy again, to the legatee. The latter or his assignees were only penalized for their tardiness in demanding that the legacy be paid over by the loss of the intermediate interest. Pepper Arden justified this rule by noting that barring the legatee's claim against the personal representative might make the son pursue his father, even to gaol.<sup>30</sup> While the court generally acted, as we shall see, to bolster parents' power over their children, it protected funds gifted to the children, insisting that parents should maintain their children, not *vice versa*.

Chancery's insistence that parents provide for their children themselves was strict enough, remarkably, to drive the court to change the shape non-parental donors gave to the gifts they made. The court made the fund such donors intended for the maintenance and education of the donees during their minorities reach the latter only at their majorities. This Chancery policy did not change the distribution of donors' property between the objects of their bounty: the same child who was to receive the interest on a certain fund still received it, if only when no longer a child. It did, however, transfer the financial burden of maintaining and educating him from the fund left by a non-parental donor to his parents. Parents often held only a limited interest in the family property, which interest was likely to be charged with significant debts to non-family obligees. The further burdening of that interest with their children's maintenance and education significantly increased the financial pressure on the resources under the parents' control. Chancery's vision of parenthood thus emphasized not only parental authority, but parental responsibility too, even at the cost of creating hardship which was unnecessary.

Depriving children from access, during minority, to an independent entitlement which their parents did not provide and could not control increased the parents' power over their children in the short term. Even should Chancery not have made that entitlement unavailable, the parents must in many cases have been able to control their children's practical access to the

<sup>29</sup> *Cooper v Douglas* (1787) 2 Bro CC 231, 29 ER 129.

<sup>30</sup> *Cooper v Thornton* (1790) 3 Bro CC 96, 29 ER 430; Bro CC 186, 29 ER 479; MS Abbot vol V 141b. These rules were not actually applied in this case, as the testator bequeathed the legacy 'to [the father], to be divided between himself and his family' rather than to the children. Under such a bequest, the payment of the legacy by the executor to the father, as trustee for himself and his family, was good. Another reason the children's bill that the surviving executrix pay the legacy again was dismissed was that they acquiesced in the payment to their father (a payment which apparently consisted of striking off some of the father's debts to the testator) for such a long time that both their father and the executor who paid him the legacy died.

funds provided. But by burdening the funds freely at the parents' disposal, the court curtailed longer term parental power: leaving less freely disposable income in parents' hands meant, for example, that the parents might not enjoy sufficient income to be able to tempt their heirs into resettling the family's property by giving them a relatively lavish income between majority and marriage. The increased authority which this Chancery policy gave parents over their children in the short term may thus have harmed the family's financial stability and security, and thus its social position, in the longer term. Chancery appears, as we shall see in greater detail below, to have put a premium on those who were currently parents to minor children exercising a maximum authority over them as well as bearing a full measure of parental responsibility, even at the cost of undermining the same families' longer term financial security, not to mention their multi-generational status preservation strategies.

So long as the shape donors gave their gifts did not infringe its policy of forcing parents to provide for their minor children themselves, however, Chancery upheld gifts quite strictly. In one case, it refused to allow maintenance out of the interest on legacies which were themselves made payable at ages higher than majority.<sup>31</sup> Where a gift of capital was given so as to be subject to the discretion of trustees between the donee's ages of 21 and 26, only becoming absolute at his age of 26 years, and the trustees declined to act, the court refused to raise the money before the donee's 26th birthday, insisting that the money was given subject to the discretion of specific persons, and was not due before the age of 26 years without them having exercised that discretion.<sup>32</sup>

Chancery adjusted the level of impecuniosity required for a father to be permitted to use the interest on a non-parental legacy left to his child to maintain that child during his minority according to the expectations of the child: children left lavish legacies were to be maintained at a standard which would well prepare them for an opulent life. A father able to maintain his child at an ordinary level, but unable to provide the lifestyle suitable for a child who was to become a very wealthy adult, might be permitted to use the interest on the child's legacy. For this to be permitted, Thurlow required that the interest be absolutely vested in that child, rather than, say, given to 'the first child of X to reach 21', whose identity is strictly unknown to X even if his only child is 20, especially under 18th-century mortality.<sup>33</sup> In one such case slightly before Thurlow's appointment, maintenance out of the interest on children's legacies was, exceptionally, allowed without that interest even having been bequeathed by the testator for the children to be maintained thereout. This exceptional decision may be explained by the father being unable to maintain his children

<sup>31</sup> *Lewis v Lewis* (1785) 1 Cox 162, 29 ER 1109; MS Abbot vol VI 100a.

<sup>32</sup> *Descrambes v Tomkins* (1784) 1 Cox 133, 29 ER 1095.

<sup>33</sup> *Buckworth v Buckworth* (1784) 1 Cox 80, 29 ER 1072; MS Abbot vol VI 35b.

at the princely standard at which they were going to have the means to live on attaining majority, by him having a child to maintain who was not a beneficiary of the will, and by the remainderwoman of both the portions and the residue—the mother—having consented to the allowance being made.<sup>34</sup> Not allowing recipients of non-parental portions to be maintained, during minority, out of the interest on their legacies spread the parents' resources between all of their children, while the interest on non-parental funds destined for some but not all of them was quietly accumulating. The court's acknowledgment that this was a good reason for allowing maintenance out of the interest on non-parental gifts may have opened the crack in the policy of unexcludable parental liability to maintain which later led Lord Loughborough to his revolutionizing of the law in this area, discussed below.

Chancery's insistence on children being maintained by their parents led it to oppose advancement—the payment of any part of the capital of gifts to children before the time set for their payment, often majority. This opposition even held in some cases where the child was not otherwise provided for, as in a case of a portioned child whose widowed mother gave up her own jointure and other provision to her late husband's creditors. On her second husband having generously maintained his step-son, the executors of the deceased donor, who was no relation of the donee, thinking these expenses proper, reimbursed the stepfather out of the capital of the gift before the time the testator had set for its payment. Thurlow made these executors pay the legacy again to an assignee of the legatee, despite the legatee having given his stepfather a receipt for the sum of the legacy, and, by his will, the legacy itself. Whether or not Thurlow was extending the unexcludable duty of provision to stepfathers, Chancery's hostility to advancement and its protection of purchasers of choses in action<sup>35</sup> were both evident in his decision.<sup>36</sup> To release executors who had advanced capital from their obligation to pay again everything they advanced, the legatee had to express satisfaction once of age. Absent such satisfaction, which was not to be presumed, there was no limitation period for the exigibility of the legacy.<sup>37</sup>

<sup>34</sup> *Cavendish v Mercer* (1776) 5 Ves 199, 31 ER 543. David EC Yale, 'An Essay on Mortgages and Trusts and Allied Topics in Equity' in David EC Yale (ed), *Lord Nottingham's Chancery Cases, Volume II* (79 SS 1961), 21, n 1, cited this case and *Greenwell v Greenwell* (1800) 5 Ves 194, 31 ER 541 (discussed at text to nn 41–42) in support of his claim that 'the court was prepared to ignore the testator's directions and allow a present maintenance to be paid notwithstanding a direction to accumulate'. Yale did not distinguish between provisions made for children by their parents and those given them by non-parental donors. As to the latter, his claim cannot stand as a description of late 18th-century equity, which tended to direct accumulation even where a present maintenance was expressly given, unless the parents were unable to themselves maintain their child, within which exception fall both *Cavendish* and *Greenwell*.

<sup>35</sup> See this protection manifested in the court's protecting a daughter, donee by settlement of an interest in a chose in action belonging to her father, against the claims of the father's creditors: *Dundas v Dutens* (1790) 2 Cox 235, 30 ER 109; 1 Ves 196, 30 ER 298; MS Abbot vol V 147a.

<sup>36</sup> *Davies v Austen et al* (1790) 3 Bro CC 178, 29 ER 475; 1 Ves 247, 30 ER 325.

<sup>37</sup> *Lee v Brown* (1798) 4 Ves 362, 31 ER 184.

Lastly, cases of clear fraud were exceptional. Where a father was so far from providing for his child, as to have married based on a fraudulent misrepresentation regarding his property, to have been imprisoned by his creditors and to have demanded that his wife come, with their child, to live with him in prison, Thurlow allowed money from the fund in the bank to be paid to the mother for the immediate maintenance of herself and her child, even though the interest on the money was limited to the mother for life, rather than to her son, and was thus, at law, her husband's.<sup>38</sup> Excepting such cases, and cases of parents who could not afford to prepare their children for the wealthy life which expected them once grown up, Chancery put, up until and including Thurlow's time as Chancellor, a premium on ensuring that children depended on their parents for their livelihoods, and that parents bore the full economic burden of raising their children. The court acted to isolate each bi-generational familial cell economically until the children's majority, stopping gifts by either members of the extended family or strangers from disrupting the familial balance of dependence and responsibility.

(ii) *The 1790s: a new flexibility*

It was under Lord Loughborough, the final Chancellor of the century, that the law regarding allowing maintenance out of the interest on non-parental legacies was made more flexible. The court would now allow it at its discretion, based on the circumstances of each case, provided that the donor expressly gave the interest, or maintenance out of it, to the child. The first serious breach in the old rule was made in a case where the portion fund was of the wife's fortune rather than a non-parental gift. The gift of the interest on the fund to trustees to maintain and educate the children thereout was seen by Loughborough, adopting the arguments of Scott, as part of the marriage bargain, the wife not giving her husband any interest in her fortune, in consideration for releasing him from the maintenance of the children they were to have. The presence of the husband's six children of a former marriage, who took no interest in the wife's fortune, also contributed to the decision.<sup>39</sup> The new doctrine was consolidated in *Hoste v Pratt*, a more conventional case of a non-parental legacy, Loughborough clearly holding that he would allow maintenance out of the interest without bothering with an inquiry as to the father's ability to maintain the children himself, and indeed would still allow it, under certain circumstances, even where the father was clearly able to maintain them. Such circumstances included the father having—as in that case—numerous children, some of whom were not entitled to non-parental legacies: by permitting the father to draw on the interest of the legacies for maintaining those entitled to them, the court enabled him to concentrate his own income on maintaining

<sup>38</sup> *Atherton v Nowell* (1786) 1 Cox 229, 29 ER 1142.

<sup>39</sup> *Mundy v Earl Howe* (1793) 4 Bro CC 223, 29 ER 863.

those not so entitled, thus making the overall receipts of each of the children slightly more equal.<sup>40</sup> The breach with the old law was completed in a case where, as a legatee's mother and stepfather were obviously unable to maintain him, Loughborough allowed maintenance out of the interest on a non-parental legacy for the time past as well as the future.<sup>41</sup> The parents' inability to maintain being obvious to the Chancellor, he dispensed with a reference to the Master to inquire and report on that issue and ordered the payment immediately himself, procedural innovations later applied to Chancery practice as a whole by reforming legislation of 1852.<sup>42</sup>

Behind the older rule of unexcludable parental liability to provide for one's minor children lay a Roman-style notion of the father as lord and ruler of his family: both entitled to obedience and liable for maintenance. That the children be actually maintained by their father was seen as a key characteristic of normative family life. The availability to them of independent sources of maintenance might critically diminish the father's effective authority and control. The more flexible approach employed as the century was nearing its end focused, instead, on removing legal impediments for as many children as possible being maintained at the best standard possible under the circumstances. Choosing to admit the reality of many propertied families having functioned as an economic unit larger than the bi-generational familial cell, the court was, by the end of the century, softening its ideal of children being maintained by no-one but their parents.

### B. *The Portion: A Duty, Not a Gift*

As strict as parents' duty to provide for their minor children might have been in Chancery before the final years of the century, it still ended, at law, at the parents' death. The testamentary freedom permitted by late 18th-century English law meant parents were not strictly obliged to leave any property to their children. Testamentary gifts to children were common, but certainly not obligatory, much like there was no obligation on a living parent to maintain his adult children. Equity, contrastingly, saw the parental duty to provide as relevant to parents' testamentary choices.<sup>43</sup> This view is made plain in that while equity refused, until Loughborough's chancellorship, to allow the whole or part of the interest on non-parental legacies to be spent on the legatee's

<sup>40</sup> *Hoste v Pratt* (1798) 3 Ves 730, 30 ER 1243.

<sup>41</sup> Pepper Arden has, as early as 1794, allowed the interest on children's legacies to be paid to the father for maintaining his children in the past as well as the future, in a case not reported in print: *Cartwright v Cartwright* (1794) MS Abbot vol XII 32b.

<sup>42</sup> *Greenwell* (n 34); Masters in Chancery Abolition Act 1852 (15 & 16 Vict c 36). Pepper Arden again seems to have preceded Loughborough, commenting, obiter, in *Cartwright* (ibid) that in cases involving small sums of money, decrees should be made without the expense of an inquiry by the Master.

<sup>43</sup> Much like the ecclesiastical courts of the province of Canterbury, which, when they still heard estate administration cases, limited parents' testamentary freedom so as to enforce their duty to support children without sufficient provision of their own: Helmholz, '*Legitim*' (n 19) 257–58.

maintenance or education until majority, even when expressly bequeathed for those purposes, it read a gift of the interest during minority into parental portions made payable on majority, even where there was no such express gift, or simply a gift of 'maintenance'.<sup>44</sup> Chancery was even ready, in one case of parental legacies, to step into a parent's shoes and execute a power he was given, but did not use, to raise sums for the maintenance and education of his children.<sup>45</sup>

Chancery's different treatment of parental and non-parental legacies is explained by the maintenance of children out of parental property, and indeed the transfer of at least some parental property from parents to their children at quite an early age, being a key Chancery policy. Unlike non-parental legacies, the parental portion was conceived of by equity as the fulfilment of a duty, not a gift. Where the duty was imperfectly fulfilled, as where there was no express gift of the interest during minority, the court saw itself as justified in reading such a gift into the will. Only where there was no chance of that duty being fulfilled, as where the father had no, or too little, property out of which to provide for his children, was Chancery ready to execute express gifts of the interest on non-parental legacies. Fulfilment of parental duty was a controlling policy, to which executing the wishes of non-parental donors gave pride of place.

The distinction between legacies generally and parental legacies recurs regarding the satisfaction of earlier by later legacies. By the Roman rule as to double legacies, which was then believed to have been received in equity by way of the ecclesiastical courts, two legacies given by a donor to the same donee in two different instruments were presumed to be cumulative, unless a reason appeared to the contrary.<sup>46</sup> Consequently, in one case of a non-parental legacy, followed by a gift *inter vivos* to the same donee, Chancery held the later gift to be no satisfaction of the earlier, unless the donor could be shown to have

<sup>44</sup> *Crickett v Dolby* (1795) 3 Ves 10, 30 ER 866; *Tyrrell v Tyrrell* (1798) 4 Ves 1, 31 ER 1; *Brown v Casamajor* (1799) 4 Ves 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; 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—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 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 (see this case discussed in Clyde Croft, 'Philip Yorke, First Earl of Hardwicke: An Assessment of his Legal Career' (PhD thesis, Cambridge University 1983) 324–28). 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: *Wynch v Wynch* (1788) 1 Cox 433, 29 ER 1236. The rule in the text was stated in A Late Learned Judge [Geoffrey Gilbert], *Two Treatises... the Second Entitled, Lex Praetoria* (Richard Watts 1758) 71–72, 164–65; see discussion in Michael Macnair, 'The Conceptual Basis of Trusts in the Later 17<sup>th</sup> and Early 18<sup>th</sup> Centuries' in Richard Helmholz and Reinhard Zimmermann (eds), *Itinera Fiducia* (Duncker & Humblot 1998) 225–26.

<sup>45</sup> *Long v Long* (1796) 3 Ves 286, 30 ER 1014; Loughborough kept, however, within the low interest rate mentioned in the power.

<sup>46</sup> D.22.3.12; Henry Swinburne, *A Treatise of Testaments and Last Wills* (5th edn, printed by E & R Nutt & R Gosling 1728) 526; Fonblanque (n 7) vol 2, 349–50, n (a); *Hooley v Hatton* (1777) 1 Bro CC 390n, 28 ER 1197 and the civil law sources cited there.

clearly intended to adeem the legacy.<sup>47</sup> Where the legacy and the gift *inter vivos* which followed were parental, however, the latter gift raised an evidential presumption of satisfying the earlier. Some of the rules regulating satisfaction of parental legacies were consistent with the Roman rule: parents, having allocated a certain item of property to a certain child by one instrument (often the parents' marriage settlement), could reallocate it to another recipient by another instrument (often a will), so long as they gave the former donee an alternative, larger gift by the latter instrument; the reallocation of the earlier gift can be seen as rebutting the Roman presumption of accumulation.<sup>48</sup> In so revising their allocation of their property between their children, parents were even permitted to ignore covenants which they declared when first allocating their property, to settle certain parts of it in trust for certain of their children.<sup>49</sup> Legacies parents gave a child by a later instrument could also be held to be repetitions of legacies given by a former, neither adding to the former gift nor revoking it.<sup>50</sup> These several rules are pervaded by the understanding of parental legacies as discharging a duty, which is as well discharged by any of the legacies or gifts a parent may have given his child by several different instruments as by any other (though the parent was presumed to have replaced a smaller gift with a larger, never *vice versa*). Non-parental legacies, on the other hand, were thought of as pure gifts, thus *prima facie* accumulative, and not discharged by parental gifts.<sup>51</sup>

### *C. Restriction of Parents' Attempts to Bequeath Property past their Children: Chancery's Anti-Dynastic Policy*

We have seen the judges of the late 18th-century Chancery use several doctrinal tools to ensure that propertied parents used their own funds, not those of others, to provide for their minor children. We shall now see how the same judges used construction techniques to maximize the flow of funds from parents to their children as the latter attained their majorities, married and started their own families.

To maximize asset transfers from parents to their children, Chancery sought to limit parents in disposing of the lion's share of their property past their children, settling it on, or bequeathing it to, generations further down the line. That such schemes were attempted was a manifestation of the dynastic ambitions which some Englishmen cherished.<sup>52</sup> Taking a synthetic view of

<sup>47</sup> *Powel v Cleaver* (1789) 2 Bro CC 500, 29 ER 274.

<sup>48</sup> *Moulson v Moulson* (1780) 1 Bro CC 82, 28 ER 999. A bequest by a later instrument being larger than that by a former could rebut the presumption of accumulation in non-parental legacies, too: *Allen v Callow* (1796) 3 Ves 289, 30 ER 1016.

<sup>49</sup> *Sparke v Cator* (1797) 3 Ves 531, 30 ER 1141; see further *Long v Long* (1800) 5 Ves 445, 31 ER 674.

<sup>50</sup> *Osborne* (n 18).

<sup>51</sup> *Tolson v Collins* (1799) 4 Ves 483, 31 ER 248.

<sup>52</sup> For this 'dynastic spirit', see Stone (n 15) 29, 85, 243–44; Lawrence Stone and Jeane Fawtier Stone, *An Open Elite? England 1540–1880* (Clarendon Press 1984) 69–72.

equity's treatment of the economic aspects of the parent-child relationship helps place equity's part in the court's celebrated struggle against perpetuities and accumulations in its context as one instance among many of equity's efforts to ensure that parents gave their children substantial shares of the property the parents controlled, rather than postponing most of it to later generations. Even in reviewing dispositions involving up to five generations, the court remained focused on carrying sizeable amounts of property to the generation currently reaching adulthood, marriage and parenthood. In the multi-generational context created by schemes of dynastic ambition, the chief manifestation of that focus was the court's acting to transfer 'estates of inheritance', fee simple or tail, which the parents gave their grandchildren, one generation up the line to the parents' own children, replacing the life estates many parents gave them.

A key locus of Chancery's struggle against schemes postponing the estate of inheritance in family property past donors' own children to their grandchildren, if not further down the line, was donors' execution of powers to appoint property to their 'children'.<sup>53</sup> Many appointors, having been given such powers, used them to appoint life estates to their children, postponing the estate of inheritance in the property to their grandchildren. After some hesitation, Chancery developed a clear rule holding such an execution of special powers of appointment among 'children' to be bad: donees of such powers had to execute them, if doing so by will,<sup>54</sup> by appointing estates of inheritance among their own children.<sup>55</sup> This meant that where a member of generation X, say a grandfather, gave his son, a member of generation X + 1, a power to appoint to his (the son's) children, the latter, members of generation X + 2, had to be given complete control over the capital of the gift. The son was not permitted to give his children only the income of the property for their lives (a life estate) and postpone the gift of the capital to his grandchildren, members of generation X + 3. The donor of the power, grandfather, was thus permitted to confine the property to the family for up to two generations, not three: his grandchildren, not his great-grandchildren, would be the next generation able to alienate the property outside the family. What donees of such powers often tried to do was to execute their powers by settling the property in strict settlement, giving life estates to their children and estates tail to their children's children. That Chancery systematically frustrated their

<sup>53</sup> On the practice of giving such powers to parents, often to distribute a lump sum between their younger, ie non-heir, children, see *Staves* (n 11) 202.

<sup>54</sup> There seems to have been a special exception for those executing such powers in their children's marriage settlements rather than by will: see *Routledge v Dorril* (1794) 2 Ves 357, 365; 30 ER 671, 675.

<sup>55</sup> *Pitt v Jackson* (1786) 2 Bro CC 51, 29 ER 27; *Robinson v Hardcastle* (1788) 2 TR 241, 100 ER 131; *Griffith v Harrison* (1791) 3 Bro CC 410, 29 ER 615, (1792) 4 TR 737, 100 ER 1274; *Bristow v Warde* (1794) 2 Ves 336, 30 ER 660; MS Abbot vol XII 52b; *Smith v Lord Camelford* (1794-5) 2 Ves 698, 30 ER 848; *Crompe v Barrow* (1799) 4 Ves 681, 31 ER 351.

attempts to do so shows the depth of its anti-dynastic policy.<sup>56</sup> Having ruled such an attempt bad, Chancery sought to give the appointor's children an estate of inheritance in the property, frequently an estate tail, while pretending somehow still to be enforcing the appointor's wishes. It had two main ways of doing so.<sup>57</sup>

The first was the well-known *cy près* technique, imported from the *ius commune*, described by Pepper Arden in the *Thellusson* case:

[I]f the Court can see a general intention, consistent with the rules of law, but the testator has attempted to carry that into effect in a way, that is not permitted, the Court is to give effect to the general intention, though the particular mode, shall fail.<sup>58</sup>

The court used this doctrine to justify giving the estate of inheritance in the family's property to the appointor's children, his appointment of that estate for his grandchildren having been held void. The idea, pioneered in Chancery by Lord Kenyon MR in *Pitt v Jackson*,<sup>59</sup> was to define the appointor's 'general intention' as appointing the property to his progeny. Having attempted an impermissible appointment to his grandchildren, the court purportedly did what it could to salvage his general intention by passing it to his children. That this is generally exactly what the appointor wished would not happen was gently ignored, in what was a dire infringement of the liberty of testation, cleverly disguised as a salvage operation of the results of its having been exercised.

The other major technique adopted for holding appointments of estates of inheritance to the appointor's grandchildren bad and passing such estates to his children was simply holding the entire execution of the power to be bad. This made the limitation in default of appointment in the instrument in which the power was given fall in: fortunately, this limitation nearly always gave an estate of inheritance in the property to the would-be appointor's children. The technique came into its own in the summers of 1794 and 1795, when a clutch of cases on the point were decided.<sup>60</sup> In one 1794 case, Loughborough applied

<sup>56</sup> It also shows historian John Habakkuk's surmise, based on *Trevor v Trevor* (1720) 1 P Wms 621, 24 ER 543, that Chancery, when interpreting the execution by will of marriage articles or settlements, was biased in favour of the strict settlement, to be inapplicable to the late 18th century. For his theory, Hrothgar John Habakkuk, *Marriage, Debt, and the Estates System: English Landownership, 1650-1950* (Clarendon Press 1994) 72-73.

<sup>57</sup> A nearly contemporary, practical discussion of many of the cases on the execution of powers is in Edward Burtenshaw Sugden, *A Practical Treatise of Powers* (3rd edn, J & WT Clarke 1821) 501-65.

<sup>58</sup> *Thellusson v Woodford, Woodford v Thellusson* (1798-9) 4 Ves 227, 31 ER 117; 329, 167. For the technique's origin in the lenient treatment, in canon law, of legacies *ad pias causas*, Swinburne (n 46) 67; Richard Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (The Oxford History of the Laws of England, vol 1) (OUP 2004) 417-19.

<sup>59</sup> See n 55, following Lord Mansfield and Wilmot J in *Chapman d Oliver v Brown* (1765) 3 Burr 1626, 97 ER 1015; this use of the *cy près* technique was later strongly re-endorsed by Kenyon as Chief Justice of the King's Bench: *Griffith* (n 55). On the *cy près* cases see further Sugden (n 57) 534, and Elise Bennett Histed, 'Finally Barring the Entail?' (2000) 116 LQR 445.

<sup>60</sup> The technique was applied in two leading cases: *Smith* (n 55); *Routledge* (n 54).

it to a general power, which he creatively interpreted as a special power to appoint to children, arguing that were the appointor permitted to appoint generally, his appointments would have been liable to his debts, which could not have been the intention where a power was given in marriage articles. Loughborough used this presumption to replace the testator's appointment of the income on certain funds to his children, and of the capital to his children's children in shares as his children should appoint, with a simple distribution of the personal fund among the testator's children.<sup>61</sup> The same policy of passing an estate of inheritance in family property to the children was in another case promoted by holding that once parents have distributed the capital to their children in the parents' marriage settlement, made for consideration (such as marriage), they could not later decide to postpone the distribution of capital to their grandchildren's generation, and give their children the income instead.<sup>62</sup> The overarching imperative of passing as much as possible of families' property to those family members currently reaching adulthood, marriage and parenthood thus clearly justified, for the Chancery judges, limiting the freedom of testation.

Chancery's preference for construing bequests and powers so as to give, wherever possible, the estate of inheritance in family property to members of existing, rather than of future, generations, and most preferably to young adults, held in cases involving less dramatic judicial interventions. The court upheld this policy even where donors' direct line was at an end. In a 'trust or no trust' case which hung on the sense to be given to the word 'recommend', the testator having given his sister a power to appoint between her children, and later recommended that she appoint in strict settlement, Loughborough held the 'recommendation' to be an updating of the power, including grandchildren in the class of objects, rather than a trust to appoint in strict settlement. He explained that the sense of such words depends on all the circumstances of the case and on the testator's probable intention, rather than on their grammatical import.<sup>63</sup> He could have relied on the authority of Thurlow, who had earlier held that such recommendations are no more than 'hints'.<sup>64</sup> Loughborough, however, must have had in mind a contrasting decision he gave that very year, where, after noting how in Roman praetorian law, precatory words like 'recommend' came to be held to raise fideicommissa, he held that the word 'recommend' did indeed in the case before him raise a trust for those the testator 'recommended' that the legatee settle the bequest on, after her own life interest. This last case looks like it was decided based on the Chancery policy of speeding family property to testators' successor families, including blood relations outside their direct line, to prevent the property

<sup>61</sup> *Bristow* (n 55).

<sup>62</sup> *Ward v Baugh* (1799) 4 Ves 623, 31 ER 321.

<sup>63</sup> *Meggison v Moore* (1795) 2 Ves 630, 30 ER 813.

<sup>64</sup> *Harland v Trigg* (1782) MS Hill vol 20 139.

passing outside even their extended family: a bequest to a childless daughter, recommending that she settle the fund so that after her decease it shall go to the children of another daughter of the testator's and to those of his nephew, was held to raise a trust for those children; holding otherwise would have given the capital of the fund to the legatee's widower, who might remarry and take the fund out of the testator's extended family.<sup>65</sup> The three decisions just discussed show how Chancery could put very different constructions on the same expression, so as to pass, in each case, the family capital to the closest blood relatives available.

Looking at the several manifestations of Chancery's insistence that parents transfer significant funds to their children, both as maintenance during childhood, in marrying them off, in advancing them money to buy a position in the church, army or civil service, or to start them up in a trade or profession, as well as in disposing of property at death, one is struck by Chancery's formidable hostility to parental irresponsibility and self-seeking, as expressed both in parents neglecting their children and in their bequeathing most of their property past them in pursuit of long-term dynastic glory. Chancery interfered in both parental and non-parental dispositions in order to channel donors' gifting capacities towards endowing the generation just reaching adulthood, marriage and parenthood. It was thus opposed to the dynastic vision of a static society, struggling to render young adults relatively free from the power of propertied parents to coerce and control. We now turn to Chancery's treatment of parents' more explicit attempts at control and coercion.

### 3. *The Permitted Extent of Parental Authority*

#### A. *Parental Control over Children's Choice of Spouse*

Among the classes subsisting largely on inherited wealth, perhaps the most common legal manifestation of such attempts was the conditional portion. A propertied parent could dictate his child's life choices by directing that to receive his portion of family wealth, a child had to make choices of which the parent approved. This effective carrot-and-stick mechanism was notoriously applied to control children's marital choices, by making the payment of marriage portions conditional on one or both parents, guardians, or trustees consenting to the marriage. This practice should be understood in its context of 18th-century propertied society, where marriages were often the key determinant, after birth, of individuals' and families' financial and social position. Consent clauses were thus not merely an expression of parental control over children; they were also a key instrument of the inter-family status struggle. In the late 18th century, they were used primarily as a defence

<sup>65</sup> *Malim v Keighley* (1794) 2 Ves 333, 30 ER 659; MS Abbot vol XII 38a; (1795) 2 Ves 529, 30 ER 760.

mechanism, allowing parents to block potential entrants to the family who were of insufficient status.

European societies' employment of such conditions has been variable. They were popular among the higher echelons of Roman society. The Roman state passed, when labouring under the long-term depopulation caused by the civil war of the first century before the common era (BCE), sweeping legislation holding all such conditions void. Diluting the requirement for a *paterfamilias*' consent to any marriage of anyone in his power, the legislation also gave magistrates authority to supply such consent, under some circumstances, in place of a spouse's *paterfamilias*, as where the latter unreasonably withheld his consent.<sup>66</sup> The Middle Ages seem to have seen a reversal of this permissive trend, as the Canon law held a daughter's marrying contrary to her father's express wishes to justify her disinherison,<sup>67</sup> and Cooper noted that the trend among great English landowners in the centuries after 1300 was towards the parental restriction of marriage.<sup>68</sup> Reported late 18th-century Chancery cases (the facts of which may be unrepresentative of social reality as a whole, even among the Chancery-going classes) reflect a practice of young people picking their mates themselves from among persons suitable in both status and fortune, subject to parental veto. Habakkuk remarked that exercising that veto was at all times rarely necessary, since children tended to conform to family expectations, sharing the values on which those expectations were based. The social circles they were socialized into shaped their menu of conjugal choices so as to result in an acceptable marriage.<sup>69</sup>

Legacies payable on marriage, on condition of parental consent, have had a chequered career in Chancery. As Probert has recently shown, they were one of the points on which two legal traditions which exercised competing pulls on equity—the common law and the civil and canon laws—were in direct conflict: the common law respected such conditions, while the civil, canon and English ecclesiastical laws held they were void. Seventeenth-century equity enforced them only occasionally: it distinguished between cases where, on the legatee infringing the condition by marrying without consent, the legacy was to go over to another taker (a gift over), and those in which the infringement worked only

<sup>66</sup> D.23.2.19, 35.1.62.2, 64, 72.4, 74, 79.4; Swinburne (n 46) 265–67. On Roman pro-nuptial policy generally, Susan Treggiari, *Roman Marriage* (OUP 1991) 60–80; Jane Gardner, *Family and Familia in Roman Law and Life* (Clarendon Press 1998) 47–55. The Roman law is explained by Johannes Voet, *Commentarius ad Pandectas* (Abrahamum de Hondt 1704) 23.2.7–10.

<sup>67</sup> Helmholz, 'Legitim' (n 19) 251.

<sup>68</sup> John P. Cooper, 'Patterns of Inheritance and Settlement by Great Landowners from the Fifteenth to the Eighteenth Centuries' in Jack Goody, Joan Thirsk and Edward Thompson (eds), *Family and Inheritance: Rural Society in Western Europe 1200–1800* (CUP 1976; hereinafter: Goody) 294–95. Compare Grotius' view that parental consent is not, in natural law, a condition for the validity of marriage: Francis Kelsey and others (trs), Hugo Grotius, *The Law of War and Peace* (Clarendon Press 1925) bk 2, ch 5, s10. This was also the canonical view, following the reform of the law of marriage by Pope Alexander III, on which see Charles Donahue, 'English and French Marriage Cases in the Later Middle Ages: Might the Differences be Explained by Differences in the Property Systems?' in Lloyd Bonfield (ed), *Marriage, Property and Succession* (Duncker & Humblot 1992) 339–41.

<sup>69</sup> Habakkuk (n 56) 154–68.

a forfeiture. The conditions were held to be effective only in the former case. In the latter, they were held to be *in terrorem* only, meant to deter legatees from marrying without consent, but of no actual effect (though, as a series of late 18th-century jurists noted, a threat known to be ineffective could hardly have supplied a powerful incentive for compliance).<sup>70</sup> Early and mid-18th-century equity tended to hold such conditions ineffective where legacies of personal property were concerned. Consent conditions restraining legacies of such property not followed by a gift over continued to be held ineffective.<sup>71</sup> Some consent clauses were brushed aside despite the presence of a gift over. In one such case, the court held the clause to be impossible of satisfaction because one of the executors who were supposed to give their consent had died.<sup>72</sup> In another, the court invoked the equitable principle that no one should be forced to give an answer leading to forfeiture in order to excuse an allegedly disobedient daughter from being compelled to answer whether she had violated the condition.<sup>73</sup> In a third, a promise by trustees, on whose consent a legacy was conditioned, that should the husband's father make a certain settlement on the couple, they would give their consent, was held to suffice, given the couple's inclination for the match, despite the father not having made such a settlement.<sup>74</sup> Such cases can be read as demonstrating an understanding of inter-generational family relations committed to providing children with at least a degree of freedom regarding their choice of spouse. Alternatively (or cumulatively), they can be read as committed to minimizing family discord: the early 18th-century court was clearly loath to fan the flames by declaring that children had in fact married without consent and were, thus, not due the portions which were earlier allotted them. The court's hostile approach to conditions restraining legacies of personal property was clearly inspired by that of the civil law. Where portions, directed to be raised out of land, were concerned, the mid-18th-century court took a very different approach: in this context, it enforced consent clauses even in the absence of a gift over. Such portions having 'nothing testamentary in them', the court followed the common, rather than the civil law.<sup>75</sup>

<sup>70</sup> See discussion in Probert, 'Control over Marriage' (n 3) 431–41. For a case of enforcement, see *Fry v Porter* (1669) 1 Ch Cas 138, 22 ER 731 (discussed by Yale (n 34) 25), where Chancery refused to give a daughter who had nocturnally eloped her legacy, enforcing a 'consent clause' despite the girl's mother and two Earls, on whose consent the gift depended, having at length consented to the marriage, and despite the girl having had no notice of the condition at the time she married. Chancery could thus on occasion insist on parents' control of their children's marital choices more than the parents themselves. Still, according to general statements by 17th century judges, Chancery followed the civil law, by which such conditions were void, except where the 'consent clause' was followed by a limitation over: Yale, 26, and fn 3 for comments by Nottingham, citing comments by Hale to this effect.

<sup>71</sup> *Wheeler v Bingham* (1746) 3 Atk 364, 26 ER 1010; *Underwood v Morris* (1741) 2 Atk 184, 26 ER 515.

<sup>72</sup> *Peyton v Bury* (1731) 2 P Wms 626, 24 ER 889.

<sup>73</sup> *Wrottesley v Bendish* (1733) 3 P Wms 235, 24 ER 1042. Both *Wrottesley* and *Peyton* were discussed by Staves (n 11) 205–6.

<sup>74</sup> *Daley v Desbouverie* (1738) 2 Atk 261, 26 ER 561, noted by Probert, 'Control over Marriage' (n 3) 437, n 129.

<sup>75</sup> *Harvey v Aston* (1737–38) 1 Atk 361, 379; 26 ER 230, 241.

Late 18th-century parents and ‘friends’ took a variety of steps so as to direct, or react to, the marital choices of their children or young relatives. The conditional marriage portion remained a popular device.<sup>76</sup> Some fathers gave their daughters portions despite their having married not only without consent, but eminently unsuitable persons.<sup>77</sup> Others made portions conditional on the recipient not marrying at all, one father explaining that his infirm daughter’s marriage ‘could only bring disgrace upon her family’.<sup>78</sup> An unwise marriage could be punished after the fact, as where an uncle transferred the share of the residue of his property that would have gone to an errant niece from her to her children, the interest to accumulate until their majority.<sup>79</sup> Though nearly all the pertinent reported cases for our period discuss the application of such consent requirements to daughters, they appear to have at least occasionally been applied to sons as well. Peter Thellusson placed especially great restrictions on his eldest son, Peter Isaac: his marriage at whatever age had to be with the consent of both his mother and trustees, else he would lose his expectations (shrunken as they were after most of his father’s fortune having been tapped to fund the famous accumulation for Peter Isaac’s grandchildren), and receive only a small annuity, with maintenance for his issue at the discretion of trustees.<sup>80</sup>

Chancery’s treatment of consent clauses seems to have changed in the altered legal landscape produced by the Clandestine Marriages Act of 1753, which made all minors’ marriages by licence—the form of marriage preferred by the propertied—subject to parental consent, though contracting a valid marriage by banns absent such consent remained possible.<sup>81</sup> So far as adult children were concerned, the late 18th-century Chancery generally objected to parents directing their marriages by means of conditional marriage portions. As ever, once a decisive policy was in place, the Chancellors and Masters of the Rolls were never short of ploys, arguments and constructions to make it effective. In one case, Thurlow construed a consent condition, which was clearly meant to apply whether the testator’s daughter was under or over 21

<sup>76</sup> *Contra* Eileen Spring, who claimed such conditions were totally ineffective at either law or equity, and were superseded by 1720 by giving parents powers of appointment of a given sum between their younger children: Eileen Spring, ‘The Family, Strict Settlement, and Historians’ in Gerry Rubin and David Sugarman (eds), *Law, Economy and Society* (Professional Books 1984) 186–87 and ‘Law and the Theory of the Affective Family’ (1984) 16 *Albion* 1, 3. The condition need not take away the entire portion on marriage without consent. Some donors directed that it be cut in half on that event, as in the will discussed in *Mills v Norris* (1800) 5 *Ves* 335, 31 *ER* 617.

<sup>77</sup> So did Pinckney Wilkinson in *Pit* (n 55) and *Smith* (same note); having struggled with the bad appointment he had made, both Kenyon MR and Loughborough on bills of review gave the disobedient daughter an even larger sum than the hefty portion her father intended to give her.

<sup>78</sup> *Fontaine v Pellet* (1791) 1 *Ves* 337, 30 *ER* 374.

<sup>79</sup> *Hawkins v Combe* (1782) 1 *Bro CC* 335, 28 *ER* 1165.

<sup>80</sup> His father also postponed his entitlement to his expectations, including any income, until his age of 31 years, and made use of a strict protective trust, which was to terminate his entitlement immediately on his attempting to charge or alienate either capital or income; Polden (n 10) 232. Eileen Spring’s statement that such consent clauses were never applied to male issue seems inaccurate: Spring, ‘The Family’ (n 76), 186–87.

<sup>81</sup> See n 2; on which Act see Lemmings (n 4) and Probert’s works cited in nn 3 and 11. For the propertied classes’ preference for marriage by license, see Probert, ‘Control over Marriage’ (n 3) 426.

years, as two alternative conditions, laying hold of unconnected provisions in the will which mentioned the legatee's age of 21 years: to be entitled to her legacy, the daughter had to either reach the age of 21 years or marry with consent. Alternatively, he held that the testator had expressed only a part of his intentions, and that 'very imperfectly and inadequately'. This interpretation gave the daughter, who married over 21 years without consent, her legacy.<sup>82</sup> In other cases of adult children who married without the required consent, the catchment area of consent requirements was sharply narrowed: they were restricted to first marriages<sup>83</sup> and to marriages during the parents' lives.<sup>84</sup> A general consent by the parents to any marriage the legatee might contract was in one case held to satisfy the condition, and the court even remarked obiter that where consent was not required to be in writing, consent after marriage has been held sufficient.<sup>85</sup> In another case, Loughborough construed a condition against the legatee's marrying a specific, named person, obviously meant as an absolute condition, so that its breach merely postponed the payment of the legacy by a year.<sup>86</sup> The result in all these cases was to entitle the children before the court to their legacies.

When hearing cases of minor children who married without parental consent, the court took the opposite attitude, strenuously upholding such conditions in effective disregard of the Roman and civil law rule against them. Thurlow and Loughborough each contributed a leading case on this issue.<sup>87</sup> In both cases, the conditions were upheld and daughters who married under the age of 21 years without consent were denied their legacies.

It thus appears, as Probert also found, that late 18th-century equity became rather friendlier towards the conditioning of marriage portions on parental consent than it was earlier in the century, effectively harmonizing this part of legacy law with the consent requirements to which minors' marriages themselves were since 1753 subjected, so long as they married by licence. From a perspective internal to the court's doctrinal discourse, this reform was probably more justified than not: there was no reason to apply to 18th-century England the peculiar shape into which Julian and Augustan legislation moulded Roman law, making marriage portions payable without parental consent while leaving marriage itself, for persons in *potestas*, subject to such consent, which was, however, supplied by magistrates under certain circumstances. The major

<sup>82</sup> *Jones v the Earl of Suffolk* (1782) 1 Bro CC 528, 28 ER 1278.

<sup>83</sup> *Hutcheson v Hammond* (1790) 3 Bro CC 128, 29 ER 449; *Crommelin v Crommelin* (1796) 3 Ves 227, 30 ER 982, in which case holding that the consent requirement applied to the daughter's second marriage would not have made her lose her legacy, as she married an eminently suitable husband, who was consented to by one of the trustees her father had appointed for this purpose.

<sup>84</sup> *Mercer and Wife v Hall* (1793) 4 Bro CC 326, 29 ER 917.

<sup>85</sup> *ibid.*, in which case consent *was* required to be in writing.

<sup>86</sup> *Osborn v Brown* (1800) 5 Ves 527, 31 ER 717. Conditions not to marry a specific person were generally held to be valid by both the civil law and equity: RSD Roper, *A Treatise upon the Law of Legacies* (J Butterworth 1799) 51.

<sup>87</sup> *Scott v Tyler* (1788) 2 Bro CC 431, 29 ER 241; 2 Dick 712, 21 ER 448; (1791) MS Abbot vol IV 76b, discussed in Probert, 'Control over Marriage' (n 3) 437–38; *Stackpole v Beaumont* (1796) 3 Ves 89, 30 ER 909.

relevant difference between the two legal systems was that all English children were, in effect, automatically emancipated at majority. This useful bright-line rule facilitated the creation, consistently with much English social practice,<sup>88</sup> of two different legal regimes, applicable to minors and adults respectively: the one rendering ‘infants’ increasingly incapable of marrying absent parental consent (though marriage by banns, absent such consent, remained possible), the other making all adults free, legally speaking, to marry as they chose—though social norms and constraints significantly limited that freedom.

Chancery’s gradual legitimation of consent clauses so far as minors were concerned synchronizes nicely with one of the few observations on which Lawrence Stone and Linda Pollock, who developed very different theories on the social history of the English family, nearly agreed: that as the 18th century was drawing to an end, and increasingly after 1800, many English families were becoming more authoritarian, a development Stone attributed to fears born of the French revolution and of Evangelism.<sup>89</sup> The court’s approach to the parent–child relationship thus seems to have tracked the changing norms of propertied society itself. While changes in social norms are often hard to date precisely, the attempts of several historians, whose versions of English social history do not otherwise cohere, to date the hardening of English parenting do point to the final two decades of the 18th century and the first decade of the 19th as the crucial time when this social transformation was taking place. Stone dated the ‘revival of... paternal authority... among the middle classes from about 1770’, and the end of what he saw as ‘an era of growing individualism and permissiveness which was dominant in the upper middle and upper classes... to about 1790’.<sup>90</sup> The far more cautious Pollock dated ‘the distinct intensification of adult demands for obedience and conformity’ to the early 19th century<sup>91</sup>; Stone agreed that the new tendency intensified after 1800.<sup>92</sup> The two seem to have been describing the same social development, the different dating resulting from Pollock’s safer interpretive approach to her data. Historian Dror Wahrman saw the decline of the indistinctiveness and fluidity of social identities characteristic of mid-18th-century English society as having been precipitated by England’s loss of the American war in 1782, and then

<sup>88</sup> Many donors themselves made consent requirements expire at the donee’s majority. See, as to wills by Banbury testators, Richard Vann, ‘Wills and the Family in an English Town: Banbury, 1550-1800’ (1979) 4 J Family History 346, 362.

<sup>89</sup> Stone (n 15) 667–73; Pollock (n 16) 269. For the late 18th century return of Evangelism, see Joanna Innes, ‘Politics and Morals’ in Eckhart Hellmuth (ed), *The Transformation of Political Culture* (OUP 1990); Leonore Davidoff and Catherine Hall, *Family Fortunes* (rev edn, Routledge 2002) ch 1, who mainly discuss its influence on the social construction of gender; Boyd Hilton, *A Mad, Bad and Dangerous People? England 1783-1846* (Clarendon Press 2006) 174–84.

<sup>90</sup> Stone, *ibid* 666.

<sup>91</sup> Pollock (n 16) 269.

<sup>92</sup> Pollock noted that the new severity was particularly evident in the schools, and that it occurred ‘in only a minority of texts’ (*ibid*, 269). The stricter parenting characteristic of ‘the Romantic period’ was also noted by Quinlan and Shackelford (n 15), who attributed it, at 457–58, 460–61, to the stricter timetables industrial-era children had to be educated to obey.

aggravated by the war with France from 1793.<sup>93</sup> Chancery first declared the new rule, according to which consent clauses were generally valid when imposed on minors, in *Scott v Tyler*, a 1788 decision, and repeated it in 1796.<sup>94</sup> The court was thus adjusting its view of the permissible extent of parental power just as the society it policed was similarly adjusting its own.

The judicial policies discussed to this point cohere to form a distinct parenthood model: the court insisted that parents provide for their minor children, and gradually extended parental authority over them. Simultaneously, it facilitated the transfer of a maximum amount of family property from parents to their young adult children. While parental support and gifting were encouraged regarding children of any age, the court was sharpening a distinction between ‘infants’, who their parents could legitimately control, and adult children, who should be, where possible, provided with family funds, and then left to pursue their fortunes free of parental control.<sup>95</sup>

### B. *Support for Parental Authority: Other Cases*

While the court acted to facilitate parental spending on children and asset transfers to them, its balanced model of parent–child relations posited parents, particularly fathers, as wealthier than their children. Among social groups mainly dependent on inherited wealth, situations in which children enjoy a propertied leverage over their parents are rare. A few late 18th-century propertied English fathers occasionally suffered under such a disadvantage, however, and some of them seem to have successfully pressured their sons into resettlements of the family property, transferring property and dispositive power from son to father. When such resettlements were later challenged in Chancery, the son—or his creditors—alleging undue influence and the abuse of paternal power, Chancery was slow to warm to these arguments. In the case of one family the whole of whose property came through the wife, the eldest son enjoyed, on the death of his mother, far greater property than his father: the son was tenant in tail of an estate, his father just a life tenant of a smaller one. To change this situation, the son was made, the day after his mother’s funeral, to endorse a memorandum prepared by the family attorney, later made into a formal resettlement, which charged his sisters’ portions on his estate, and resettled it so as to bring it back into his father’s family line on default of the son’s male issue. When the son challenged this resettlement in Chancery, Gould J fully adopted the father’s narrative of his own responsible behaviour and his son’s extravagance, preferring it to the son’s story of undue influence, surprise and misrepresentation. Gould acknowledged that fathers enjoy

<sup>93</sup> Wahrman (n 1) 45–82, 166–97.

<sup>94</sup> *Stackpole v Beaumont* (n 87).

<sup>95</sup> Holly Brewer showed how English minors lost, during the 18th century, capacity to create many kinds of legal consequences, which they had under earlier law: *By Birth or Consent: Children, Law & the Anglo-American Revolution in Authority* (University of North Carolina Press 2005) 232–301.

‘a power of restraint and correction’ over their children, which may be exercised in the service of salubrious goals such as redressing the father’s deficit of propertied power *vis-à-vis* his son in the instant case. In rejecting the son’s demand that his father account as to the use he has made of money raised by sale of a part of the son’s estate, Gould commented that ‘my mind revolts against there being a strict account taken of this sum’.<sup>96</sup> The case reflects an understanding of parents’ power and wealth advantage over their children as natural, a family equilibrium which should be restored where disestablished. In another case, a son’s creditors claimed that a resettlement of the family property, in which the son gave up, as was conventional in resettlements, his estate tail in the property for a life estate, and also limited a 2000-year term on the estate to raise, by sale or mortgage, £3000 and pay it to the father to cover his debts, was both void under the Statutes of Elizabeth and voidable for undue influence. In answering the latter claim, Pepper Arden noted that should a father take away his son’s estate by the power of his authority, without consideration, that would be a strong case for the intervention of equity; but only where the son applied to the court in a reasonable time, while the circumstances may be known and family transactions unravelled. Arden exploited the time which had passed since the resettlement in the case before him to raise an artificial doubt whether the father had not used some of the money raised from the estate for the son’s own benefit. Raising this spurious doubt, however, protected the son, since having the resettlement declared void would have exposed him to his creditors.<sup>97</sup>

As such cases make clear, that through much of this article Chancery is shown protecting children from their rapacious parents is simply due to the fact that most children were at their parents’ mercy, in matters of property as in other matters. Within certain broadly defined limits, Chancery was supportive of parental power and control, and redressed them when impaired.<sup>98</sup> Like Blackstone, who balanced, in his *Commentaries*, a discussion of ‘[t]he legal

<sup>96</sup> *Kinchant v Kinchant* (1784) 1 Bro CC 369, 28 ER 1183, MS Hill vol 20 200.

<sup>97</sup> *Brown v Carter* (1800-01) 5 Ves 862, 31 ER 898.

<sup>98</sup> Exceptional was the case of a father who sold an annuity at less than its market price to a person who was, unbeknownst to the father, the agent of his son, with whom the father refused to deal. Thurlow refused to help this father, who was clearly swindled by his son, cut his losses by redeeming the annuity. The father, Lord Irnham, failed to convince Thurlow to admit parol evidence (which Chancery would to combat fraud) and enforce a redemption clause, which despite being part of the parties’ agreement, was not written down as part of it, because of the parties’ fear that including it would bring their agreement within the mischief of the Usury Acts: *Lord Irnham v Child* (1781) 1 Bro CC 92, 28 ER 1006; Dick 554, 21 ER 386, MS Hill vol 15 129. The dishonest son was allowed to prevail, perhaps because the father, as a party to the decision to omit the ‘hidden clause’ from the written agreement, did not come to court with clean hands; or because the father was a notorious libertine, mentioned in the *Diaboliad* as a candidate to inherit Satan: William Combe, *The Diaboliad, a Poem* (G Kearsly 1777) 22–23; see further Charles Jenkinson, *The Life, History, and Remarkable Pedigree of the Right Honourable Simon Lord Irnham... Father of the Renowned Colonel Luttrell... Dedicated... to the... Freeholders of the County of Middlesex* (G Richards 1769). His son was H Lawes Luttrell, nominated to Parliament in 1769 to replace John Wilkes, thrice-chosen as member for Middlesex: Langford (n 1) 580 and sources cited.

duties of parents to their legitimate children' with a discussion of '[t]heir power over them',<sup>99</sup> the court balanced parental power over children with parental duties regarding them, not with the children's own power. While encouraging parental expenditure on children during minority and the transfer of parental assets to children at, or soon after, their majority, the court preferred parents, including parents of adult children, to remain the principal family power holders.

#### 4. *Conclusion*

Recent work on the late 18th-century court of Chancery's interventions in families' allocations of rights in their property between their members has sometimes emphasized the court's support for parental power, as in Probert's work on consent clauses.<sup>100</sup> Other work, such as Polden's recent volume on the *Thelluson* case and its aftermath,<sup>101</sup> focused on the restrictions the court put on parents' power to allocate those rights beyond their children, to generations further down the line. One contribution of the present article is in attempting a more synoptic view of the court's interventions, restricting its ambit to a relatively brief period so as to facilitate a study of the court's responses to all major types of question concerning the allocation of families' property between their members which came before it.

As described above, I have found the court to have established a balance between parental power to allocate family property, parents' use of that power to direct their children's behaviour, and the limits put on that power to ensure that children, both minor and adult, were well provided for. The court facilitated some exercises of parental power, such as consent clauses and resettlements correcting situations where children controlled more property than their parents, while restricting others, such as parental use of funds gifted by others to provide for their minor children.

Analysis of the court's policy choices exposes its values, its priorities and the familial functioning it saw as desirable. Forcing parents to maintain their children themselves was a prod to unselfishness and to thinking of family property as the property of a multi-generational unit rather than of the parent as individual. It surely tended to reinforce both parental responsibility and filial obedience and gratitude. The anti-dynastic policy prevented current generations being economically handicapped by their deceased ancestors, and facilitated the foundation of new families, including the establishment of appropriate parental relationships between young parents and their children, by transferring large amounts of property to young adult family members. The

<sup>99</sup> William Blackstone, *Commentaries on the Laws of England*, vol 1 (1st edn, Clarendon Press 1765) 434, and his discussion to 442.

<sup>100</sup> Probert, 'Control over Marriage' (n 3) 431–41, 450.

<sup>101</sup> Polden (n 10).

protection of gifts to children, payable at majority, from parental interference carried out donors' choices and provided the recipients with a start in life. The court's approval of minor children's legacies being made conditional on parental consent to their choice of spouse supported filial deference and must have prevented many unfortunate matches; its striking down such conditions for adult children gave them an increased degree of independence. Chancery protected both parents and children from each other's capricious decisions, protecting families' property from unreasonable and egotistical decisions by either generation.

I identified two key policy changes which took place as the century was nearing its end: the court became more flexible in permitting parents to make use, in maintaining their children, of funds gifted for that purpose by others, and came to enforce consent clauses restricting minor children's liberty to choose their spouses, while thwarting attempts to impose a similar restriction on adult children. The court may have adopted those changes in response to its earlier stance having harboured a destabilizing potential for many families. Permitting minors to choose their spouses absent parental consent, where the person chosen became entitled, merely by being so chosen, to an (often significant) portion of family wealth, could clearly jeopardize a family's economic well-being, which was a crucial determinant of social status. Enforcing minors' spousal choices made absent parental consent did not bode well for family relationships, either. The court's insistence that parents provide for their minor children themselves even where other sums of money were expressly made available for this purpose from extra-parental sources could also have adverse consequences. Obviously, spending family funds on objects which could be attained with other funds reduced the former unnecessarily. The court's insistence exacerbated the already-existing inequality between children receiving non-parental gifts and their siblings, while reducing the share of family wealth allotted to each sibling. Further, using non-parental funds to provide for at least some children during their minorities would have enabled a family to save or invest more of its income, leaving the father with more property with which, for example, to tempt his eldest son into resettling the family property. Chancery's insistence that parents maintain their children and pay for their education and other needs, even where other funds were available for those purposes, dictated an economically sub-optimal course of action, reducing families' chances of economic survival in the longer term. The court seems to have focused on each bi-generational family unit functioning according to the court's preferred model of parent-child relations rather than on multi-generational, long-term family economic survival, well-being and social pre-eminence. It actively discouraged family strategies focused on the latter, such as perpetuities and accumulations, being opposed to the dynastic vision of a static society.

Beyond the progress made here in providing a more comprehensive description of the late 18th-century Chancery's judicial policies in family property matters, the article makes three further contributions to the literature. One is in showing that the principles Chancery applied to questions of family property tracked the contemporary preferences of English propertied parents. The policy adjustments made towards the end of the century echoed the deepening of parental authoritarianism which, historians of the English family agreed, took place soon before and soon after the turn of the century. Another contribution is in demonstrating that rules drawn from Roman and later civil law sources, acknowledged as such, were a functioning part of equity as late as the late 18th century. Though the court felt, by this period, free to depart from such rules, they were still part of the equity discourse, adverted to and cited by both counsel and court. Lastly, that the court, at times, modified its rules, adjusting the balance it struck between parental authority and responsibility, shows that Patrick Polden has overshot the mark in remarking that equity has become, by the end of the 18th century, so precedent-bound that the Chancellors and Masters of the Rolls denied themselves power to adjust their precedents.<sup>102</sup> Not that their commitment to following precedent was not substantial: the court distinguished sharply between 'res integra', points never before decided, and points which had already been decided in Chancery. Earlier Chancery decisions on a point were accorded substantial weight when the point came again before the court, especially if the earlier cases were consistent, revealing a well-established 'course of the court'. Even points of legacy law never before decided in Chancery were sometimes decided based on the practice of the Ecclesiastical courts, the judges reasoning that questions both fora were competent to decide should be similarly decided by both. It is undeniable, however, that occasionally, points already decided in Chancery were reopened, the judges preferring arguments of judicial policy to the weight of authority.<sup>103</sup>

As demonstrated in this article, the loosening of the historical study of 18th- and 19th-century equity from its traditional focus on either procedural inadequacies, specific doctrines or specific social contexts can bear interesting fruit, attainable by reading larger bodies of case law, published and unpublished, against the doctrinal grain, searching for explicit and implicit policies across the lines which divide doctrine from doctrine in traditional legal discourse.

<sup>102</sup> Polden (n 10) 183.

<sup>103</sup> For a late 18th century statement on the subject see John Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill* (2nd edn, 1787) 4, n (b): 'Principles of decision adopted by the courts of equity, when fully established and made the grounds of successive decisions, are considered by those courts as rules to be observed with as much strictness as positive law.'