

# CAN ONE INHERIT A HOME AS OPPOSED TO A HOUSE? A NORMATIVE AND COMPARATIVE PERSPECTIVE

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## I. INTRODUCTION

This article asks whether one can inherit a home as opposed to a house—conceptually and legally—and offers a comparative analysis of the question. The sociological understanding of inheriting a home relies on the concept of home as a personal creation. To inherit a home means to live in the home of the decedent. If the heir decides to sell the property or rent it, then she did not inherit a home, but rather a house, a piece of property.<sup>1</sup> This sociological argument by Janet Finch &

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<sup>1</sup> Janet Finch & Lynn Hayes, *Inheritance, Death and the Concept of Home*, 28 SOC. 417 (1994); see also CAROL SMART, *PERSONAL LIFE* 165 (2007); JANET FINCH & JENNIFER MASON, *PASSING ON: KINSHIP AND INHERITANCE IN ENGLAND* 129 (2000).

Lynn Hayes emphasizes the living arrangement and explains that a successor inherits a home only if he or she chooses to live at the home of the previous owner. Because most people are reluctant to leave their own home and move into the home of the deceased, the sociological conclusion is that a home is so strongly connected with its creator that it dies with him or her and cannot be inherited.

I argue that this is a narrow interpretation of the question, one that is not supported by the law. I support this argument with a normative account and a comparative analysis of a wide range of legal systems, including civil law countries (such as France, Austria, Italy, and Finland) and common law countries (United States, England, Canada, and Israel).

In thinking about inheriting a home, two different interpretations of this process guide the analysis, and as we move forward, I will suggest a third possibility. The first interpretation emphasizes the living arrangement as an essential component of inheriting a home. The recipient thus lives in the owner's home, and possibly even preserves its core design. The physical spatiality connects the owner and her successor, and the successor is, at times willingly, bound by it to the home of another. This interpretation of inheriting a home is evident in sociological writings of the home. The second interpretation emphasizes the process of inheriting property by which the successors inherit a home and are free to re-interpret it through renting, selling, or using the home. When making a decision regarding the property, recipients take into account the personal, familial, and relational meaning of the home, the owner-successor relationships, and the attachments associated with it. Whether they decide to keep the home, live in it, or sell it; the beneficiaries are still inheriting the home of the decedent. They have to make a decision regarding the home, and any decision they make reflects the process of inheriting the home.

I introduce a third interpretation because, as I explain in this article, each of these interpretations has flaws. The meaning of inheriting a home is found in cases where the owner and her successor lived together. One of the reasons the home is such a powerful symbol is that it is a place that hosts intimate social relations.<sup>2</sup> When the owner and her successor live together and share their home, a unique interaction is formed. All residents have some control over the spatial environment and each resident has to consider the other's needs and wants and behave in a way that is respectful of others. In cases of home sharing, then, the home—not just a house—can be inherited.

Comparative analysis supports this third interpretation. It looks into different jurisdictions and focuses on rules that target ownership and the right to occupy the home at the death of its owner. Currently, the right to inherit or occupy a decedent's home is usually justified as either protecting a relative from economic hardship or as part of a general sense of fairness between couples.<sup>3</sup> The

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<sup>2</sup> Lisa M. Austin, *Person, Place or Thing: Property and the Structuring of Social Relations*, 60 U. TORONTO L. J. 445, 465 (2010).

<sup>3</sup> Gillian Douglas et al., *Enduring Love? Attitudes to Family and Inheritance Law in England and Wales*, 38 J. L. & SOC. 245, 251 (2011).

perspective proposed in this article contributes an additional rationale to these familiar protections that aims to enrich the ongoing discussion.<sup>4</sup>

This article proceeds as follows: Part II discusses inheritance in general and suggests, following my previous work,<sup>5</sup> the framework of continuity as a model that facilitates understanding of core values within inheritance. This part serves as the theoretical foundation for this inquiry. Part III analyzes the home as a particular kind of property and examines the sociological understanding more closely. Part IV deliberates on inheriting the home in contemporary culture and offers ways to reinvent it. It suggests alternatives for further empirical work following the normative and conceptual critique. Part V turns to the law and examines different models of protecting the process of inheriting a home in various legal systems. The comparative perspective exposes the different normative foundations associated with each model and highlights the difficulties of the sociological understanding.

## II. INHERITANCE AND CONTINUITY

### A. Inheritance and Continuity

The question of whether one can inherit a home as opposed to a house depends on whether inheritance can be more than just a transfer of property; it focuses on the symbolic meaning of inheritance and the home. I therefore begin with an account that highlights the symbolic attributes of inheriting property.

Inheritance has three important features. First, inheritance is the devolution of property after death. As opposed to lifetime transfers, inheritance is entangled with mortality and with aspirations of achieving immortality. Second, the property owner has to make a transfer to someone else, as she cannot keep the property. Inheritance thus establishes a connection between the owner and the recipients of the property who remain in the world. Third, this connection is achieved through transfers of property. Property has the potential to connect different generations in various ways.

The value of continuity resonates with the three unique attributes of inheritance. Continuity is an attempt to transcend mortality by connecting to previous and future generations. Inheritance is a form of continuity through property.<sup>6</sup> Property, according to this argument, symbolizes and carries certain types of intergenerational relations in a way that contributes to one's identity and connectivity. In inheritance, property enables individuals of different generations to become connected through a shared project of continuity.

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<sup>4</sup> See generally ALUN HUMPHREY ET AL., INHERITANCE AND THE FAMILY: ATTITUDES TO WILL-MAKING AND INTESTACY 35, 41 (2010).

<sup>5</sup> See Shelly Kreiczer-Levy, *Inheritance Legal Systems and the Intergenerational Bond*, 46 REAL PROP. TR. & EST. L.J. 495 (2012).

<sup>6</sup> *Id.*

We usually think of continuity as connecting generations, building collective memories, and creating intergenerational societies. Indeed, continuity can be created and maintained in various ways, most of which have nothing to do with the law. Continuity is also a helpful framework for the analysis of certain legal institutions, in this case, inheritance law. It explains how connections are formed between successive owners of a property.

Continuity provides an analytical model for incorporating the relational aspects and interconnectedness of inheritance into contemporary legal theory. It is a particularly useful framework from a comparative or historical standpoint because it allows us to compare and contrast very different inheritance systems such as primogeniture, equal distribution, testamentary freedom, and forced heirship. Historical and modern rules of inheritance share a similar core: engaging with property in order to transcend mortality. However, this purpose can be achieved in a variety of ways, either by focusing on the pedigree or by focusing on the bond between individuals: the owner and beneficiary. I will begin with the former, which provides a more straightforward conception of continuity, and then discuss the latter.

## **B. Dynastic Forms of Inheritance and Continuity**

An examination of past legal practice reveals the centrality of certain types of property in creating and maintaining continuity. Land was passed along generations as a single, undivided unit that symbolized the family name and status. Continuity was understood not as an individual good for the owner and certain relatives, but as a concept that ties generations together and transcends individuals.

A clear example of this pattern is primogeniture, i.e. inheritance by the firstborn of the entirety (or a large portion) of a parent's wealth.<sup>7</sup> The purpose of this arrangement is to keep the property intact and avoid splitting land into small portions, so that the family name will last (nearly) forever. Another example is entail. Entail is a voluntary practice whereby the first owner limits inheritance of property to a defined class of heirs.<sup>8</sup> The first testator controls the passage of property for a very long period of time, thus ensuring the survival of property and the family name.

C. Y. Cyrus Chu explains these inheritance patterns as being due to certain historical economic realities.<sup>9</sup> He argues that a dynastic pattern, such as primogeniture, is an optimal strategy when the goal is to lower the risk of extinguishing the dynasty. When the market is imperfect and mobility rates are

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<sup>7</sup> Stanley N. Katz, *Republicanism and the Law of Inheritance in American Revolutionary Era*, 76 MICH. L. REV. 1 (1977).

<sup>8</sup> Holly Brewer, *Entailing Aristocracy in Colonial Virginia: "Ancient Feudal Restraints" and the Revolutionary Reform*, 54 WM. & MARY Q. 307 (1997).

<sup>9</sup> C. Y. Cyrus Chu, *Primogeniture*, 99 J. POL. ECON. 78 (1991).

very low, the head of the family knows that if he makes one son rich, the odds are he will remain rich:

Furthermore, with rigid income mobility, family heads of the poor or middle-income groups may resort to this tried-and-true wisdom of unequal bequest division to break the intrinsic rigidity so that some of their offspring, who would most probably stay poor if bequests were divided evenly, may now stand a better chance of joining the rich. As such, although primogeniture does cause a temporal income inequality, it can break the intertemporal rigid upward mobility and may eventually help to equalize the steady-state income distribution.<sup>10</sup>

Ralph Giesey's work<sup>11</sup> on pre-revolutionary France best illustrates this point. For commoners, family property involved a complicated set of rules. Immovable property was divided into *acquêts* and *propres*. *Acquêts* included property that a person had acquired during his lifetime as a product of his labor and therefore had the right to freely dispose of. *Propres*, on the other hand, were composed of property a person had inherited or received as a gift and was thus required to pass on to his children. It was considered to belong entirely to the future generations of the family line. This legal structure was not directed only to the future—the next generations—but also to the past—the previous generation's family line. Interestingly enough, the property of each spouse was kept separate from the couple's joint property. In case they did not produce heirs, the property would go back to its original source. Additionally, if they decided to sell the *propres*, they had to replace it with another asset of equal value. The general rule was that four-fifths of the *propres* were to be divided equally among the children. This sort of limitation had the potential to undermine the dynastic nature of *propres*. Over the years, however, many ways developed to overcome it. By the eighteenth-century, the *propres* had become a lineage property much like the primogeniture rule of the nobility.<sup>12</sup>

The structure of *propres* created a form of lineage property designed to protect the family. In a world where social mobility is limited and few options are open to an individual, an effective way to move forward is to put aside personal goals and focus instead on the family line as a way of improving the odds of success. This way of thinking requires that the family be viewed as more important than the individual. Put differently, it requires seeing the good of the family as strongly linked to the good of the individual. This structure reflects a

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<sup>10</sup> *Id.* at 87.

<sup>11</sup> Ralph E. Giesey, *Rules of Inheritance and Strategies of Mobility in Pre-revolutionary France*, 82 AM. HIST. REV. 271 (1977).

<sup>12</sup> *Id.* at 277.

traditional conception of continuity.<sup>13</sup> I will refer to it as “strong continuity.” Even though these patterns appear long gone, there are still examples of modern day quasi-dynastic succession patterns, such as the family farm and the homestead of the very wealthy.

In the context of many modern farms, the owner strives to preserve the farm as a reasonable economic unit for his successor.<sup>14</sup> Dividing the farm into small parcels will make the land less economically viable.<sup>15</sup> Choosing only one heir is an inherent attribute of strong continuity, not unlike primogeniture. Most successors of family farms and businesses are sons and not daughters,<sup>16</sup> resulting in discrimination against women and their exclusion from the family property. This tension can be characterized in terms of continuity. Strong continuity favors the intergenerational family represented by the undivided family farm. The individual choices of the farmers and their children are secondary to the goal of preserving the property.

In all of these examples, the property itself is important because the property—primarily the land—symbolizes the family. The family is understood as a dynastic line. Other family members, such as children who do not inherit the property, are excluded from inheritance and their interests are sacrificed for the greater good.

### **C. Inheritance and Continuity as an Individual Good**

Continuity is frequently associated with preservation, slow and gradual progress, and social artifacts that transcend individuals. Dynastic inheritance patterns such as primogeniture illustrate this point. Nonetheless, continuity can also be an individual good, highlighting individual interests at the expense of social and familial interests. To explain how inheritance can be conceptualized as creating and maintaining continuity for individuals, I take a step back and begin with the meaning of continuity as it has been analyzed in a variety of scholarly works from different disciplines.

Continuity is a reaction to the threat of mortality. Human beings are mortal and aware of their finitude.<sup>17</sup> At the same time, the world around them

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<sup>13</sup> Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, WIS. L. REV. 340, 352 (1966).

<sup>14</sup> See Malcolm Voyce, *Testamentary Freedom, Patriarchy and Inheritance of the Family Farm in Australia*, 34 SOCIOLOGIA RURALIS 71 (1994); Hannah Alsgaard, *Rural Inheritance: Gender Disparities in Farm Transmission*, 88 N.D. L. REV. 347 (2012).

<sup>15</sup> Alsgaard, *supra* note 14, at 358; Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L.J. 549, 551-552 (2001).

<sup>16</sup> Alsgaard, *supra* note 14; Daphna Hacker, *The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought*, 7 J. EMPIRICAL LEGAL STUD. 322 (2010).

<sup>17</sup> ZYGMUNT BAUMAN, *MORTALITY, IMMORTALITY AND OTHER LIFE STRATEGIES* 3 (1992).

with its natural and cultural artifacts will continue to exist after they are gone.<sup>18</sup> There is a gap between human life, with its concrete beginning and end, and the rest of the world, which poses the threat of a meaningless existence. Continuity offers a connection to the world of culture in a way that potentially transcends our concrete existence.<sup>19</sup> Continuity allows people to connect themselves to the world both by participating in existing artifacts and endeavors and by creating new ones. Various cultural artifacts, be they music and art, family and affection, or nations and symbols, represent a form of continuity. This basic insight is shared by scholars from different disciplines.<sup>20</sup>

Continuity has a social and cultural component, since cultural endeavors require the participation of both past and future generations. Continuity for individuals includes two complementary elements: the need to establish continuity of self after death and the need for roots. The first element is concerned with influencing the world after one is no longer part of it. Lifton argues that we use the symbolization of continuity in order to genuinely confront our mortality.<sup>21</sup> It is “an inner quest for continuous symbolic relationship to what has gone before and what will continue after our finite individual lives.”<sup>22</sup> The second element involves the need to connect to the world that existed before one appeared in it. The world we are born into is filled with traditions, meanings, relations, and conventions. People require guidance, education, and support. They need to be connected to family, culture, and heritage. Scholars have stressed the need for tradition and guidance due to the importance of roots for the creation of an identity and participation in the world of culture.<sup>23</sup>

These two elements are interdependent.<sup>24</sup> All successful projects of continuity require the combination of both elements. Be it education or tradition, writing a book or establishing a caring relationship, continuity in one way or another requires a coalition of these two elements. The reader of the book, the daughter who carries on her parents’ tradition, the student who continues her teacher’s work all make the effort of the author, parent, or teacher worthwhile. They allow her to continue being in the world. At the same time, any person who wishes to connect to the world, to a tradition, a family, or a group, needs the

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<sup>18</sup> HANNAH ARENDT, *THE HUMAN CONDITION* 19 (1958).

<sup>19</sup> Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029 (1990).

<sup>20</sup> Eric Strachan et al., *Coping with the Inevitability of Death: Terror Management and Mismanagement*, in *COPING WITH STRESS* 114, 114 (C.R. Snyder ed., 2001); ERNEST BECKER, *THE DENIAL OF DEATH* (1975); ROBERT J. LIFTON, *THE BROKEN CONNECTION: ON DEATH AND THE CONTINUITY OF LIFE* (1979).

<sup>21</sup> Lifton, *supra* note 20, at 17.

<sup>22</sup> *Id.*

<sup>23</sup> SIMONE WEIL, *THE NEED FOR ROOTS: PRELUDE TO A DECLARATION OF DUTIES TOWARDS MANKIND* (Arthur Wills trans., 1952); Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25 (1994).

<sup>24</sup> Kronman, *supra* note 19.

teacher, parent, or mentor to embark on the enterprise of continuity. Continuity cannot be accomplished alone; it requires a joint effort.

I have argued elsewhere that inheritance is one of the socio-legal artifacts that establishes continuity in both its aspects.<sup>25</sup> The two dimensions of continuity—the desire to be continued in the world, and the need for roots—correspond with the two core ideas in inheritance: testamentary freedom and family protection. This claim rests on the fact that property is an important cultural artifact in the Western world. Property is a symbol of identity,<sup>26</sup> influence, and connections; it therefore has the potential to serve as a tool for transcending our limited existence. This notion of property is supplemented by the social, cultural, and legal meanings associated with the transfer of property, and in particular gratuitous transfers, as studies on gift-giving suggest.<sup>27</sup>

Inheritance establishes a unique form of continuity, combining the attributes of gifts with its own characteristics. A gift incorporates an implied social duty to reciprocate; it is a general expectation with no defined date or amount, which is founded on trust.<sup>28</sup> In inheritance, the duty to reciprocate is elusive. It would seem that the recipient can never reciprocate, as she receives the bequest only after the giver's death; she is able to, however, by remembering the giver, cherishing her memory, and respecting her legacy.

By that I do not mean that property has to be a non-fungible object in order for its transfer to carry the deep meaning of continuity. Indeed, the way property allows the giver to transcend her mortality is rooted not only in *objects*, but also in her *decisions*. When the giver chooses her recipient, decides what the recipient will get and how much, she actually creates a bond. The bond is established because she does two things—she reveals her own taste, preference, and personality by choosing, and she influences her recipient's life, thus inspiring gratitude. Furthermore, in inheritance, the giver passes on something and the recipient gets it. It is hers now, to use or misuse. The fact that property is transferable and the recipient becomes the new owner is highly significant. Inheritance creates something new, which is the bond established by the passing of the property.

This characterization of inheritance brings the value of continuity through property to modern times. Instead of focusing on how inheritance systems were previously about familial continuity while today they are about individual will, framing continuity as a good for individuals allows us to analyze

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<sup>25</sup> Shelly Krecizer-Levy, *The Riddle of Inheritance: Connecting Continuity and Property* (2011) (unpublished manuscript) (on file with the author).

<sup>26</sup> Margaret Jane Radin, *Property and Personhood*, in REINTERPRETING PROPERTY 35 (1993).

<sup>27</sup> See, e.g., ROSALYN DIPROSE, *THE BODIES OF WOMEN: ETHICS, EMBODIMENT AND SEXUAL DIFFERENCE* (1994); Barry Schwartz, *The Social Psychology of the Gift*, 73 AM. J. SOC. 1 (1967); Alvin W Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOC. REV. 161 (1960).

<sup>28</sup> PETER M. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* (1964).



and compare legal systems governing inheritance, past and present. Modern legal systems reveal a range of continuity-based conceptions.<sup>29</sup> Each particular construction strikes a different balance between the interest to continue one's being in the world, epitomized by testamentary freedom, and the need for roots, epitomized by family protection. Some countries exhibit a strict conception of continuity based primarily on biological affiliation. Indeed, many European countries impose heavy limitations on the freedom of testation.<sup>30</sup>

Other systems begin with testamentary freedom, but allow courts to re-write wills and award adequate provision for the proper maintenance and support of a group of relatives.<sup>31</sup> In these countries, the owner's personal vision of continuity is respected, but only if she takes certain obligations seriously and respects certain recipients' positions. Yet other systems, such as those of the United States and Israel, understand inheritance as serving primarily the owner's interest in continuity, but still recognize the position of certain family members through a set of construction default rules<sup>32</sup> or judicial manipulation.<sup>33</sup>

In all these modern legal systems, continuity is understood and structured as an individual good. In some, it is the individual good of the property owner, fulfilling her interest in influencing the world after her demise. In others, continuity is also an individual good for certain family members or dependents in recognition of their need for roots. The point here is that continuity is not understood, at least not primarily, as reinforcing the pedigree or dynasty, but rather that inheritance is perceived as a good for the individuals involved. The property allows for a bond to be created between two complementary needs.

One could argue that forced heirship in certain European countries can be characterized as reinforcing dynastic family lines. This is one possible interpretation of their succession rules. Another possible interpretation revolves around the individuals, albeit from a social perspective. Forced heirship to children creates a social reality where almost everyone inherits. Since almost everyone has parents, and since parents have to leave some of their estate to all their children, it is very likely that every person will receive an inheritance. The legal system of forced inheritance to children emphasizes the importance of *receiving* an inheritance. The fact that a person receives an inheritance is a good

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<sup>29</sup> Krecizer-Levy, *Inheritance Legal Systems and the Intergenerational Bond*, *supra* note 5.

<sup>30</sup> Andrea Bonomi, *La Vocation Successorale Volontaire dans Certain Droits Européens*, in *LE DROIT DES SUCCESSIONS EN EUROPE* 31 (2003).

<sup>31</sup> E.L.G. TYLER, *FAMILY PROVISION* (1971); *see also* Elizabeth Cooke, *Intestacy and Family Provision Claims on Death*, 80 *AMICUS CURIAE* 1(2009).

<sup>32</sup> Shelly Krecizer-Levy, *Deliberative Accountability Rules in Inheritance Law: Promoting Accountable Estate Planning*, 45 *MICH. J.L. REFORM* 937 (2012).

<sup>33</sup> Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 *N.C. L. REV.* 551 (1999); Ray D Madoff, *Unmasking Undue Influence*, 81 *MINN. L. REV.* 571(1997); John A. Lovett, *Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction*, 72 *LA. L. REV.* 923 (2012).

in itself. The basic good that stems from receiving and giving an inheritance is the creation of continuity. Forced heirship allows everyone to experience continuity, not only as a giver, but also as a recipient. This means that every person is entitled to be connected to someone else, to continue that person in a way, to belong to that person.

Even if one disagrees with this characterization of forced heirship, the point is clear. I want to distinguish between continuity for individuals and dynastic structures. There are two possible models of continuity: one that centers on the property transferred (the land, the farm, the home), and the other that focuses on the individuals. Now that the general framework of inheritance and continuity has been explained, I will move on to discuss the home, and specifically inheriting a home.

### III. INHERITING THE HOME

#### A. The Meaning of the Home

The question whether one can inherit a home as opposed to a house is interesting because the home is a unique asset. There is a wide variety of multidisciplinary scholarship on the significance of the home, which was the inspiration for sociological work. However, scholarship has not been monophonic, as a home can be meaningful in many ways, both individual and communal.

One of the most familiar legal analyses of the home is Margaret Radin's theory of property as personhood.<sup>34</sup> Radin argues generally that property is closely connected to personhood. People need to hold certain possessions in order to achieve self-development. Radin makes the normative claim that some assets deserve the law's enhanced protection, while others do not. The home is one of her typical examples of an asset that is closely connected to personhood because it is a "scene of one's history and future, one's life and growth."<sup>35</sup>

In addition, the meaning of home has been studied in various disciplines, including phenomenology, psychology, sociology, and environmental studies.<sup>36</sup> The particular place of residence opens up a range of emotions and attachments. It allows the occupier to create a personal environment that reflects her needs, character, and taste. The home serves as a symbol of how a person sees herself and how she wants others to think of her.<sup>37</sup> The home inspires a sense of

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<sup>34</sup> Radin, *supra* note 26.

<sup>35</sup> Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 992 (1982).

<sup>36</sup> Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J. L. SOC'Y. 580 (2002).

<sup>37</sup> Sandy G. Smith, *The Essential Qualities of a Home*, 14 J. ENVTL. PSYCHOL. 31 (1994).

belonging, permanence, and continuity.<sup>38</sup> It is potentially a place of refuge, a haven—a place where one begins her journey and a place to come back to. Other values that have been associated with the home are security, control, privacy, and identity.<sup>39</sup>

This conception of the home has been criticized. There is an inherent duality in the concept of home. Thus, feminist theorists argue that the home is a prison for women, subjecting them to the traditional role of tending to the needs of other members of the family.<sup>40</sup> Another critique is that the home is essentially a white, heterosexual, middle-class concept. Others have challenged the home as creating identity. Stephanie Stern claims that there is little evidence from psychological research to support the argument that the home constructs identity. Instead, the home expresses and maintains identity.<sup>41</sup>

There is an inherent duality in the home. It is a place of both empowerment and vulnerability, of both autonomy and subordination, of expressing and shaping one's identity while being influenced by others. Alongside its meanings to the individual, it is important to note that the home is also a locus of relationships. It functions as a social and cultural unit for interaction. The home enables interactions with others, either as guests and neighbors or the people one lives with<sup>42</sup> and even pets.<sup>43</sup> Living with others is a core experience within the home. The idea of home includes a mixture of individual and communal experiences. Home for the individual means privacy and autonomy located in space; home is also an experience made meaningful by the relationships formed within it, and by the obligations surrounding it.

The home can potentially allow for a plurality of experiences and different familial types. The sociological position understands the home mainly as an individual experience, because it focuses on the home as representing the identity of its owner, now deceased. Alternatively, home can be understood as a unit of interaction and a locus for the family, whether defined narrowly or broadly. Home can also be understood as the homestead, where the family mansion is being passed on from one generation to the next. All these visions of the home reflect different conceptions of the family and familial obligations. All point to different meanings of the home, and consequently of inheriting the home.

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<sup>38</sup> Judith Sixsmith, *The Meaning of Home: an Exploratory Study of Environmental Experience*, 6 J. ENVTL. PSYCHOL. 281 (1986).

<sup>39</sup> Fox, *The Meaning of Home*, *supra* note 36.

<sup>40</sup> See Lorna Fox, *Re-Possessing "Home": A Re-Analysis of Gender, Homeownership and Debtor Default for Feminist Legal Theory*, 14 WM. & MARY J. WOMEN & L. 423, 435-51 (2008).

<sup>41</sup> Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093 (2009).

<sup>42</sup> Sixsmith, *supra* note 38; Shelley Mallett, *Understanding Home: a Critical Review of the Literature*, 52 SOC. REV. 62, 68 (2004).

<sup>43</sup> Smith, *supra* note 37, at 37.

This cluster of meanings raises important questions: if the home is truly an individual sphere for its owner, how can it be inherited? What is the meaning of inheriting a home? Are there other interpretations of the home and inheritance that make inheriting the home meaningful?

### **B. Inheriting a Home?**

I now turn to discuss the prominent work of Finch & Hayes on the home.<sup>44</sup> In this particular article, they draw on two of their earlier empirical studies. The first is a random sample of 800 wills probated in four sample years in the northwest and southeast regions of England. The second includes a series of in-depth interviews with individuals about their experience of inheritance within their own families. The authors are aware that their general data on inheritance can only provide partial insights into the complex questions regarding inheritance of the home.

The authors divide their inquiry into two separate categories: the perspectives of testators, including their wishes and motivations, and the position and practices of beneficiaries. First they ask whether the home dies with the person and look into some data about the ways in which houses are bequeathed in wills. They focus on whether a testator passes her home intact as a specific asset or instead treats it as a non-specified part of the estate. The authors assume that if the home is transmitted intact, it may outlive its creator and become the home of the beneficiaries. They contrast this option with an outcome whereby the home is sold and its value is converted to money.

Finch & Hayes' main finding in this first category is that only seven percent of wills singled out the testator's own home. However, bequests of one's home to a co-resident (a person who shared a home with the testator) were almost twice as common as bequests to a person who lived elsewhere. Most co-residents were spouses or cohabitees, and the authors think this finding reflects a prominent reason for singling out the home; namely the cultural emphasis on the home as the creation of the couple. It is important to note, however, that out of twenty-nine such examples, fourteen cases included co-residents that were not spouses or cohabitees.

The second category refers to the perspective of beneficiaries, based on interview data. The main inquiry here is whether the beneficiary exercised the option of living in the decedent's home. There are two main types of beneficiaries: people who inherited a house in which they themselves were not living at the time of the decedent's death, and people who shared their home with the deceased as co-residents. The authors find that people who did not live in the home at the time of the decedent's death were reluctant to leave their own home and move into the home of the deceased. Even when the testator expected them to

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<sup>44</sup> Finch & Hayes, *supra* note 1.

live there, they resented this kind of pressure and preferred to sell the property. Co-resident beneficiaries had a somewhat different reaction. The authors' expectation was that co-residents who are also co-owners would continue living in the home. Even in these cases, however, some beneficiaries felt that the home strongly symbolized the decedent and staying at the home was occasionally a difficult experience.

A very interesting group consists of co-residents who are not co-owners. Finch & Hayes provide only two such samples; both were never-married daughters that inherited the home they had shared with their fathers.<sup>45</sup> The authors claim that these cases do not exhibit a smooth transition from the deceased's home to the beneficiary's home. One of the daughters stayed with her brother and his wife for about a month after her father died, and when she decided she was ready to return home, she and her brothers first completely redecorated it. In the second example, the daughter stayed in the house but shortly afterwards moved out, primarily due to pressure from her brothers. The authors understand redecoration of the home and transition periods to be undermining of the process of inheritance of the home. That, however, is not necessarily the correct conclusion. In the first example, the daughter continued living in the owner's home but needed to be around family during the mourning period. Redecoration may simply have allowed the beneficiary to feel comfortable in her home, to take her father's home and make it feel, with a few changes and improvements, like her own home as well. The second example teaches us only that the position of other family members is very influential. At any rate, these two examples are hardly sufficient to prove that co-residents prefer selling the home of the testator.

The article's conclusion is that in the contemporary British context, a home is so strongly identified with its creator that it does die with him or her. This conclusion reaffirms the meaning of the home as an individual experience of its owner. At the same time, the process of turning a home back into a house, which involves emptying it of the former owner's possessions, is a very emotional one. It symbolizes, according to the authors, a social burial. Although the study relates to a specific social context, its conceptual implications can be analyzed more broadly.

The authors do not make any normative argument about inheriting the home, nor do they support a specific legal rule or policy. In what follows, I discuss whether this interpretation of "inheriting the home," which they take for granted, is the only plausible interpretation of this concept. I also compare it to other alternatives, which may be more appealing descriptively or normatively. When I point to the issues in their interpretation, my aim is not to critique their sociological project, but to highlight some of their interpretation's normative and conceptual implications.

Finch & Hayes arrive at this conclusion because they make certain assumptions about what it means to inherit the home. They assume that inheriting

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<sup>45</sup> *Id.* at 426-27.

someone's home means to replace your own home with the home of the deceased. The beneficiary thus assumes the physical qualities and legal rights of the decedent's home. The successor steps into the former owner's shoes, as she now becomes the owner and resident of the property. In this sense, the home transcends the individual and becomes a property that outlives its owners. In terms of continuity, Finch & Hayes' study highlights a rather strong version of continuity, whereby the property remains intact even though its creator has passed away. This is a compelling idea at first glance because it provides a powerful metaphor for intergenerational bonds. The main problem with Finch & Hayes' interpretation is that it is ill-suited to contemporary society, as indeed their conclusion demonstrates, because it downplays the role of individuals.

The difficulty is that if the home is indeed an individual experience expressing the identity of its owner, then the home also serves as an individual experience for the inheritor. Individual recipients do not simply step into the owner's shoes, but have their own preferences and needs. Strong continuity neglects the good of individuals in favor of the good of the family, as we saw in the brief historical survey of dynastic patterns in Part II.B. It is hardly surprising that people who inherit a house in which they themselves were not living do not want to leave their own home. To leave one's home is to sacrifice all of the meanings associated with it: in particular, stability, safety, and identity.<sup>46</sup> Choosing one's home is closely connected to liberal values of freedom and privacy. As Rakoff notes, home reflects "a desire to escape from other people and from social involvement, the establishment of a place from which others could be excluded and where, consequently, one can truly be oneself, in control, 'more of an individual.'"<sup>47</sup> In addition, Finch & Hayes' emphasis on occupancy and their assumption that redecorating the home infringes on the notion of inheriting the home to some extent strongly ties the home with identity. If it is accepted that the home symbolizes, shapes, or expresses identity, the requirement to move into the deceased's home essentially means to assume the identity of the deceased; it makes the beneficiary subject to the testator.

One could argue that this sociological perspective on inheriting the home is very different from dynastic patterns of inheritance. Instead of focusing on family lineage, their article discusses the owner-resident's home. There is, of course, a difference between the two. Nonetheless, expecting someone who did not live with the owner to move into her home is unrealistic. It is unrealistic exactly because of the meanings of the home and the modern emphasis on individual self-development. Since the authors have framed the question of inheriting the home as exchanging one's home for the decedent's home, they have in fact framed inheritance as *a fictitious identification of the successor with the former owner*. Given their focus on the owner's identity, their interpretation of

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<sup>46</sup> See Sixsmith, *supra* note 38, at 282; see also Jeanne Moore, *Placing Home in Context* 20 J. ENVTL. PSYCHOL. 207 (2000).

<sup>47</sup> Robert M. Rakoff, *Ideology in Everyday Life: The Meaning of the House*, 7 POL. & SOC'Y 85, 94 (1977).

inheritance becomes much like dynastic inheritance patterns in its emphasis on the kind of property (the land, the home) and in its belittling of the role of recipients as individuals.

There are examples of modern day quasi-dynastic succession patterns where the inheritance of the home is a common practice. These would be examples of inheriting the home as the sociological perspective sees it. Nonetheless, the conclusion to be drawn from this analysis seems to be that in contemporary society, inheriting the home is not a real option if we care about the individual position of recipients. In one type of situation, however, the home of another does meet the needs of the individual recipient. Co-resident beneficiaries represent a fresh take on strong continuity; one that is respectful of the individual's position. As we have seen, people who have shared their home with the deceased are more likely to continue living in his or her home. Strong continuity in this case is not only based on the transfer of property, but also founded on the activity of sharing the home.

This exception builds on the plurality of meanings associated with the home. The home is not just about control and autonomy, either for the owner or the co-resident. Some philosophers understand the home as essentially being with others.<sup>48</sup> Indeed, one of the most important meanings of a home relates to a person's relationships with people within the home.<sup>49</sup> As Sixsmith explains,

Thus, the social network built around a home and the relationships that create and are created in a home are of an utmost importance. . . . It is familiarity with other people, their habits, emotions, actions etc., indeed the very knowledge that they are there, which creates an atmosphere of social understanding, whereby the person's own opinions, actions and moods are accepted, if not always welcomed.<sup>50</sup>

Inheriting the home thus makes the most sense in modern times in the context of home-sharing. The decedent and the beneficiary share not only the physical asset, but also their lives. Much as in dynastic inheritance patterns, the property remains intact. However, unlike those patterns, what unites the parties is not the property, but the living arrangement. Both parties' individuality, and not just the identity of the home-creator, gives the property its unique meaning. I argue that home-sharing marks the potential to reinvent the inheritance of the home and I elaborate on this point in Part IV.

Finch & Hayes identify the exception of home-sharing, but for them it is a minor matter, secondary to their overall theme. Co-residence is one sub-category of inheriting the home, not one that justifies rethinking the home or rethinking inheritance. Furthermore, they argue that even in cases of home-

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<sup>48</sup> Mallet, *supra* note 42, at 81.

<sup>49</sup> Smith, *supra* note 37, at 33.

<sup>50</sup> Sixsmith, *supra* note 38, at 291.

sharing the transition from home to home is not smooth. However, I think that their result supports my argument. Both daughters in their study continued to live in the home at least for a while. It is true that both of them made their decision together with their siblings. The broader familial context is crucial here, and points to the need for further empirical research to examine inheriting the home in the context of home-sharing.

#### IV. REINVENTING THE HOME

Is there another way to understand this question? Will a different interpretation yield different results? What is the role of the law? There are two additional ways to think about inheriting the home in modern times.

The first alternative is to reinvent the question by highlighting the position of the individuals involved at the expense of the property. This alternative is based on the model of continuity as an individual good. It is the *transfer* of property and not the actual possession that carries the bond of continuity between the owner and the recipient. Continuity is formed because the property is being transferred from the giver to the recipient in a way that represents the owner's preferences and choices. Recipients appreciate the bequest because of what it represents and the choices it offers them, not because of its traits.

Tykocinski and Pittman<sup>51</sup> study the unique nature of inherited money as reflected in financial decisions concerning such bequests. They demonstrate that people are reluctant to spend inherited funds or to invest them in risky financial instruments. This preservation tendency is moderated by the nature of the intended spending, the personality of the benefactor, and the nature of the relationship with the departed. For example, if the benefactor is characterized as having been vivacious and fun-loving, someone who enjoyed dancing, then the respondent will be more willing to spend the money he inherited from her on concert tickets. Indeed, even the bequest of a monetary sum is important and carries the symbolic meaning of continuity. In an article in *Forbes* magazine entitled "How to Make the Most of your Inheritance,"<sup>52</sup> estate lawyers and financial planners explain how they struggle with customers' tendency to use the money the way their benefactors would have wanted to, even if this is not the wisest thing to do financially:

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<sup>51</sup> Orit S. Tykocinski & Thane S. Pittman, *Money Imbued With Essence: How We Preserve, Invest, and Spend Inherited Money*, 35 BASIC & APPLIED SOC. PSYCHOL. 506 (2013).

<sup>52</sup> Ashlea Ebeling, *How to Make the Most of Your Inheritance*, FORBES (Feb. 15, 2011), <http://www.forbes.com/2011/02/15/baby-boomers-retirement-how-to-make-the-most-of-your-inheritance.html?partner=email>.



Folks tend to treat inheritances differently than, say, lottery winnings, according to planners who have watched clients with both. Winners are more likely to run through their money quickly. Inheritors, by contrast, have an emotional attachment to the money and often preserve it in a separate bucket from the rest of their assets. That's true even if they don't squirrel it away in an investment account.<sup>53</sup>

I am not claiming that money expresses or shapes personality, or that all assets have the same emotional value for recipients. Of course, a home, the family business, and an engagement ring all may have additional emotional value for people. This symbolic value adds to the value of continuity and accentuates it; but it is no substitute for it. When a recipient inherits a home, she can respect its previous owner and cherish his memory in multiple ways. She can sell or rent the house to people who will enjoy it and keep it well-maintained, or fill it with life herself. She can use the money from selling the home to purchase something else or to achieve a goal that was close to the owner's heart.

This interpretation allows the recipient to actively engage with the property and freely reinterpret it. It respects her individuality because she chooses what inheriting a home means for her. She does not assume the identity of the former owner by residing in her home. Nonetheless, this interpretation does not account for the unique characteristics of the home as real property. It treats the home the same way it would treat personal property and even money.

The second interpretation responds to this challenge by recognizing the unique meaning of the home, but at the same time it respects the individual position of the recipient. It therefore strikes a middle ground between strong continuity models and continuity as an individual good. I suggest that *home-sharing* embodies the core values of inheriting the home in modern or postmodern society. One of the reasons the home is such a powerful symbol is that it is a place that hosts intimate social relations. It is the location of important projects and social relations which are constitutive of identity.<sup>54</sup> When people live together, whether both own the property or just one of them, there is a unique interaction in sharing their lives with another. Each resident normally has some control over the style, decoration, or other form of the spatial environment. Each resident has to consider the other's needs and wants, and has to behave in a way that is respectful of others. In addition, all residents share a sense of togetherness when interacting with the outside world.

The question is whether the experience of home-sharing can be in some way inherited after the death of the owner (or one of the owners). The home represents not only the identity of its residents, but also the constitutive value of their relationships. After death, the home is filled with memories of the decedent,

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<sup>53</sup> *Id.*

<sup>54</sup> See Austin, *supra* note 2.

and of interaction with him or her: the table where they used to have dinner together, a specific argument they once had in the living room, or their conversations in the kitchen while cooking. The home therefore represents the decedent's identity, the co-resident's identity, and their relationship; a co-resident who chooses to continue living in the home inherits the home of the decedent in some important way. This interactive element is far greater for people who shared a home than for people who did not live with the decedent.

Yet, even co-resident beneficiaries may not want to continue living in the home. They can, of course, choose to live elsewhere. The question is whether the law should allow them to make the choice of living in the home they shared with the deceased. For co-residents, the home is a shared enterprise. It is more than the sum of two individual homes, and is instead a communal creation.

## V. COMPARATIVE ANALYSIS OF HOME-SHARING

What is the legal implication of the question presented throughout the article? Can a home be legally inherited? In order to answer this question, we first need to define the ways the law can endorse processes of inheriting a home. For this purpose, I focus on rules that target ownership and the right to occupy the home at the death of its owner. I explain that these rules often protect home sharing as the typical model of inheriting the home. The purpose of this rather brief review is not to discuss all relevant rules in every jurisdiction, but rather to present possible models of protecting home sharing and to explore the meaning of inheritance and the home that each model represents.

This analysis is particularly important because a right to inherit or occupy the decedent's home is usually justified as either protecting a relative from economic hardship or as part of an equitable distribution between couples.<sup>55</sup> The perspective proposed in this article contributes a fresh perspective of this ongoing discussion.<sup>56</sup>

I observe two main models of allocating possession and ownership in the home after the death of its owner. Each of these models, while distinct on its own merits, is occasionally joined by other strategies in the same jurisdiction. Moreover, a legal system may approach the issue of inheriting the home in different ways as part of its inheritance law and its marital property law, resulting in overlapping rules. Because the purpose of this paper is to identify and evaluate the perception of the home, inheritance, and their intersection, lines will be drawn between models and not between legal systems.

The different legal rules that deal with inheritance of the home in the context of home sharing have yet to be studied and compared. Because I characterize the rules of inheriting the home and not the legal tradition, it allows us to rethink current strategies and their normative appeal without being bound by

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<sup>55</sup> Douglas, *supra* note 3, at 251.

<sup>56</sup> See generally HUMPHREY, *supra* note 4.

rigid distinction between common law and civil law jurisdictions. As I discuss each model, I will evaluate its strengths and weaknesses, and unveil its particular perception of inheriting the home.

### **A. Protecting the Spouse**

In several jurisdictions, ‘inheriting the home’ is predominantly understood as the matrimonial home. The home is conceived as the mutual creation of the couple, regardless of ownership and title, and therefore naturally devolves to the surviving spouse.<sup>57</sup> This model fits nicely with the cultural emphasis of the home as chiefly created by a heterosexual couple,<sup>58</sup> and thus also belongs to them. It corresponds with the increasing emphasis on spousal relations as one of the most important familial relations, if not the most important of them all.<sup>59</sup> This modern trend has inspired numerous reforms in the law of inheritance.<sup>60</sup>

There are two main methods of protecting the spouse’s attachment to the home. The first method employs intestate rules that provide the spouse with the matrimonial home and household chattels, and the second creates a strict right to reside in the home. Let us look first into intestate succession. Examples can be drawn from England, Israel, and parts of Canada. In England, for instance, aside from the spouse’s statutory legacy, he or she also has the option of acquiring an interest in the home if the spouse resided at the home prior to the owner’s death.<sup>61</sup> In Israel, the spouse’s intestate share may include the home and household

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<sup>57</sup> Finch & Hayes also discuss the particular case of the spouse or cohabitee. Out of the forty-three people who left their home to a co-resident, twenty-nine people have left it to their spouse or cohabitee. In fact, they maintain that a prominent reason for singling out one’s home as a specific bequest is passing it to one’s spouse. Finch & Hayes, *supra* note 1, at 420. For a discussion of the home and unmarried couples, see Heather Conway & Phillip Girard “No Place like Home”: *The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain*, 30 QUEEN’S L.J. 715 (2004).

<sup>58</sup> See, e.g., Mallett *supra* note 42; Fox, *Re-Possessing “Home,” supra* note 40.

<sup>59</sup> See generally LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS AND THE LAW* 1-3 (2005).

<sup>60</sup> Protecting spouses is done through elective share legislation in American states. For a general history and early justifications, see John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse’s Forced Share*, 22 REAL PROP. PROB. & TR. J. 303 (1987). See also Lawrence Waggoner, *The Uniform Probate Code’s Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1 (2004). Another technique is an increase in intestate share. See, e.g., Fiona Burns, *Surviving Spouses, Surviving Children, and the Reform of Total Intestacy Law in England and Scotland: Past, Present and Future*, 33 LEGAL STUD. 85 (2013) (discussing England and Scotland).

<sup>61</sup> Intestates’ Estates Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64, § 5, sch. 2.

chattels, depending on the length of the marriage, whether or not the couple resided in the home, and the status of other legal heirs.<sup>62</sup>

In New Brunswick and Nova Scotia, Canada, intestate rules allow the spouse to either take the family home or a sum of money.<sup>63</sup> In addition, New Brunswick marital property law determines that if the surviving spouse applies for an equal division of family property, she has a presumptive right to title of the marital home.<sup>64</sup>

Intestate rules are default rules that allow an owner to opt out by executing a valid will. Although the expressive function of legal rules is significant, these defaults are commonly understood as patterning the way most people would like to bequeath their property.<sup>65</sup> This method therefore ultimately depends on the will of the owner and is meant to track her presumed intent. Emphasizing the owner's perspective in inheriting the home fits with Finch & Hayes' objectives in their study of wills and their perception of spousal relations.

A second method does not succumb to the will of the owner, but rather enforces strict rules that apply regardless of the testator's will. In France, for example, a surviving spouse holds the right to live in the matrimonial home for the first year gratuitously.<sup>66</sup> If the home is leased, the heirs must pay rent during this time. After the first year, the spouse can ask to remain in the premises. If the home was owned by the decedent, the spouse has a right to live at home for the rest of her life even if the children are the new owners.<sup>67</sup> In Belgium, the surviving spouse receives half the estate as a usufruct, which must include the home and its furniture.<sup>68</sup>

In Austria, the surviving spouse is entitled to the statutory preferential legacy, which includes the right to continue living in the marital home, including the right to household chattel.<sup>69</sup> The owner can disinherit her spouse only based on valid disinheritance grounds. Similarly, in Italy, the spouse has a right to live

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<sup>62</sup> The Succession Law, 5725-1965, 19 LSI 58, § 11 (1965).

<sup>63</sup> DAVID A. HOWLETT, *ESTATE MATTERS IN ATLANTIC CANADA* (1999).

<sup>64</sup> *Succession Law*, in 1 INTERNATIONAL ENCYCLOPEDIA OF LAWS: FAMILY AND SUCCESSION LAW § 381 (W. Pintens ed., 1997).

<sup>65</sup> See generally Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of its Context*, 73 FORDHAM L. REV. 1031 (2004).

<sup>66</sup> CHRISTIAN H. KALIN, *INTERNATIONAL REAL ESTATE HANDBOOK* 230 (4th ed. 2005).

<sup>67</sup> *Id.*

<sup>68</sup> Eleanor C. Ritaine, *National Succession Laws in Comparative Perspective*, 14 ERA F. 131, 145 (2013).

<sup>69</sup> ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] JUSTIZGESETZSAMMLUNG [JGS] No. 946/1816, as amended, § 758 (Austria); Urve Liin, *The Law of Succession in Europe and Estonia: How We Got to Where We Are and Where We Should Be Heading?* 6 JURIDICA INTERNATIONAL 114, 124 (2001).

in the home if it was owned by the decedent or co-owned by the couple.<sup>70</sup> In Finland, the surviving spouse has a right to use the last shared home.<sup>71</sup>

These methods, the one based on default rules and the one grounded in mandatory rules, both share a similar vision of the home. Home is a locus of familial life, and is typified by financial and emotional sharing of the couple.<sup>72</sup> Since both spouses contribute to the creation of the home, the death of the formal owner does not disrupt the continued residence of the surviving spouse. The difference between the two methods lies in their motivation and perspective. The first method focuses on the owner and her presumed intent, while the second focuses on the recipient (the spouse) and her protection. This divergence marks the great divide between common law and civil law jurisdictions. The former considers testamentary freedom as a pivotal value,<sup>73</sup> and the latter focuses on family protection.<sup>74</sup> Put differently, civil law systems highlight *receiving* an inheritance as a significant part of the institution, even more so than *giving* a bequest. Thus, a similar perception of the home is manifested in different ways, following different understandings of inheritance.

One notable exception to this categorization is American probate homestead law. The prevalent variety of American homestead legislation usually grants a decedent's spouse or minor children a right of occupancy in certain real estate of the decedent that may continue for a certain period of time.<sup>75</sup> This protection does not depend on the owner's will, as a limited exception to the American tradition of respecting testamentary freedom.<sup>76</sup> In addition, this rule does not require co-residence with the owner. Moreover, the Uniform Probate Code, which has been adopted by several states, replaces the right to occupy the home with a homestead allowance of a lump sum of money.<sup>77</sup> A lump sum does not protect the co-resident beneficiary, and its aim is to meet the economic needs of dependent family members. This reflects a shift from protecting the home as a unique type of property to protecting dependent relatives for the duration of administering the estate.

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<sup>70</sup> Ritaine, *supra* note 68, at 146.

<sup>71</sup> *Id.*

<sup>72</sup> Cf. Andrew P. Hayward, *Family Values in the Home: Fowler v. Barron*, 21 CHILD & FAM. L. Q. 242 (2009) (discussing joint legal title disputes over the family home).

<sup>73</sup> See, e.g., John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

<sup>74</sup> Marie L. Revillard, *France*, in EUROPEAN SUCCESSION LAWS 211, 229 (David Hayton ed., 2002); Bonomi, *supra* note 30.

<sup>75</sup> RESTATEMENT (THIRD) OF PROP: WILLS & OTHER DONATIVE TRANSFERS § 1.1 cmt. j (1999).

<sup>76</sup> See, e.g., Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12-13 (1992).

<sup>77</sup> UNIF. PROBATE CODE §2-402 (amended 2008), 8 U.L.A. 139 (1969).

## **B. Home-Sharing**

A model that focuses on spousal relations definitely protects home sharing, but it can hardly reinvent the process of ‘inheriting the home.’ It is entangled with marital property law, and aims to provide the spouse with a reasonable place to live. In other words, it functions at least partly as protection from economic hardship or deterioration of standard of living. A broader perception of home sharing looks into the nature of the relationship. It inquires into whether the owner and co-resident actually created their home together and whether their relationship is part of the meaning of the home. Although this type of comprehensive protection is not part of any of the systems studied here, there are systems that provide an alternative to spouse-oriented protection.

Section 115 of the Israel Succession Law-1965 allows the spouse, children, and parents of the decedent to continue to live in the decedent’s home, provided they lived with the decedent prior to his or her death.<sup>78</sup> These relatives become tenants of whoever is entitled to the home either by will or intestate rules. As tenants, they must pay rent to the new owners of the home. The conditions and length of this arrangement are determined by the court if the new owners and co-residents cannot reach an agreement. This rule applies to all types of home-owned or long-term leases. The testator can execute a will to the contrary which will normally prevail. Nonetheless, the court has discretion to decide otherwise.<sup>79</sup>

The rule allows people who resided with the owner to continue living in the home they shared. Note that the rule focuses only on people who lived with the owner, not people who resided in any house she owned. Note further that the requirement to pay rent refutes any claim that this section protects against economic hardship.<sup>80</sup>

Section 115 to Israeli Succession law is unique in scope and purpose. Other examples are narrower because they target specific housing regimes. New York rent control regulation is a good example. When a tenant in a rent-controlled apartment has passed away or permanently vacated the premises, her family members who lived with her may be entitled to protection from eviction. In the past, the New York rent control regulation § 2204.6(d) previously provided that upon the death of a rent control tenant, the landlord could not evict the surviving spouse of the deceased tenant or some other member of the deceased family who has been *living with the tenant*.<sup>81</sup>

In *Braschi v. Stahl Associates Company*, the court considered whether a same-sex lifetime partner of the deceased tenant falls under the definition of “family” in the regulation.<sup>82</sup> The protection applies to people who live with the

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<sup>78</sup> Succession Law, 5725-1965, 19 LSI 58, § 115 (1964-65) (Isr.), available at [http://www.nevo.co.il/law\\_html/Law01/181\\_001.htm](http://www.nevo.co.il/law_html/Law01/181_001.htm) (Hebrew).

<sup>79</sup> The Succession Law, 5725-1965, 19 LSI 58, § 111 (1965).

<sup>80</sup> See *id.* §§ 56, 57 (discussing maintenance out of the estate).

<sup>81</sup> See *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201 (1989).

<sup>82</sup> *Id.*

tenant, but not to every person who resides with her. It requires a particular relationship, one that can be termed familial, that involves co-residence. The court in *Braschi* concluded that the term family should not be restricted to formal relations, but must take into account the reality of family life.

Current regulation stipulates that where a tenant has permanently vacated the housing accommodation and “such family member has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years,” he or she will be protected from eviction.<sup>83</sup> The definition of family members is broad and includes formal relations, stepparents, in-laws, and unrelated persons, if there is an emotional and financial commitment and interdependence.

These examples focus on sharing a home during the owner’s life. A co-resident’s interest in the home is protected not because of her familial status, but rather because of home-sharing itself. Israeli succession law and New York rent control regulation both consider the recipient’s perspective at the death of the owner. The conceptual analysis ended with home sharing as a way to think about inheriting the home that is both respective of individual recipients, and acknowledges the unique characteristics of the home. Yet, in order to support a legal protection of home sharing, we need further justification. Such a justification will focus on the benefits of continuity to the co-resident. Even though Israel does not protect family members from disinheritance, it does protect co-resident family members from the loss of the home they shared with the owner.

### C. Summary

Protections of the right to occupy the home after the death of its owner are usually justified by either a need to protect against economic hardship or as part of marital property law rationale. The comparative analysis of home sharing suggested an additional rationale and provided different criteria for evaluating these rules. We have seen that the right to occupy the home is strongly connected to our perception of inheritance, whether it is grounded in testamentary freedom or family protection. Continuity can be manifested through a specific asset (primogeniture, family farms), understood as serving the giver (intestate protection of the spouse right to own, use, or occupy the home), or protecting the recipient (mandatory protections). Finally, the meanings the law attaches to the home are also influential. The home can be understood as a creation of the couple. Alternatively it can symbolize the family more broadly understood, and function as a site for experiencing meaningful relationships. Moreover, jurisdictions that do not provide any protection of the home can also be explained in terms of continuity. Continuity is created based on the decision of the owner,

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<sup>83</sup> N.Y. Comp. Codes R. & Regs. tit. 9, § 2204.6(d) (2014).

the transfer of property, and what it represents. The home is not unique, according to this view, and should not be protected.

The normative implications and legal rules discussed here merit further consideration because they raise several practical and conceptual problems. In consideration of the scope of the present article, I leave these issues for future research. The purpose of the article is not to advocate any specific rule, but instead to explore the options available. Its contribution lies in raising this-yet-to-be-discussed question and unveiling its underlying rationales.

## VI. CONCLUSION

Returning to the question that opened the article: can a person inherit a home as opposed to a house? The sociological response is contingently “no.” I have suggested two alternative interpretations of this question and highlighted home-sharing as a core value associated with inheriting the home.

Understanding inheritance as continuity and the home as a meaningful symbol unfolded three possible interpretations of inheritance, home, and the family. One interpretation attributes meaning to the home as reflecting the identity of its owner, which is inherited by successors who move in to live in the home. This interpretation explains past dynastic patterns such as primogeniture, entail, and the *propres*. It also accounts for modern quasi-dynastic patterns such as the family farm and family mansions, and has distributive effects within the family. A second interpretation stresses the importance of inheritance regardless of the physical or symbolic qualities of the asset. The individuals who bequeath or inherit the property, not the property itself, take center stage. The particular meanings associated with the home may affect the preferences of the parties, but they ultimately decide whether or not to sell the home.

These two interpretations, each with its own advantages and shortcomings, were presented in the introduction and thereafter discussed and analyzed throughout the article. Towards the end of this analysis a third interpretation emerged, one that is sensitive both to the meanings of the home and to the individual choice of recipients. Home-sharing of the benefactor and beneficiaries can give meaning to inheriting the home, but still account for the individual’s own identity, space, and home. The legal recognition of home sharing is, however, obscure. This article discussed possible models from a comparative perspective and aimed to contribute to scholarship on the right to occupy a home after the death of its owner.





